
(1978) 04 J&K CK 0002
In the Jammu And Kashmir High Court
Case No : Second Appeal No. 62 of 1973

Subash Chander and Others	Vs	APPELLANT
Mst. Shakuntala Devi and Others		RESPONDENT

Date of Decision : 06-04-1978

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 4, Order 22 Rule 5

Citation : AIR 1978 J&K 111

Hon'ble Judges : Mian Jalal-ud-din, C.J

Bench : Single Bench

Advocate : R.P. Sethi, for the Appellant; C.L. Kotwal, for the Respondent

Final Decision : Allowed

Judgement

Mian Jalal-ud-din, C.J.—This is the Plaintiffs' second appeal against the judgment and decree of the District Judge, Badarwah dated 11-8-

1973, dismissing the appeal of the Appellants against the order of abatement of the suit dated 21-6-1972 passed by the Sub-Judge, Badarwah.

2. Briefly speaking the facts of the case are that in a suit for declaration brought by the Plaintiffs against Phulla Ram and Ors. , Defendant No. 1

Phulla Ram died during the progress of the trial of the case. It is alleged that the died in the month of Chat 2023 Bikrami. An application under

Order 22, Rule 4 of the CPC was made by the Plaintiffs in which they averred that they were the sole legal heirs of Phulla Ram deceased as the

said Defendant had died issueless. This application was made in June 1967. The application was resisted by the Defendants on the ground that

Phulla Ram was survived by one Mst. Thakri, his widow, with whom he had contracted marriage. The Plaintiffs denied this fact. The Court,

thereupon, embarked upon an enquiry as envisaged under Rule 5 of Order 22 of

the CPC After a protracted enquiry the trial court found that Mst.

Thakri was the widow of the deceased and was, therefore, a legal heir to be substituted in place of Phulla Ram. But as the Plaintiffs had failed to

bring her on record in time, therefore, in the view of the trial court, the suit had abated which, was consequently dismissed. On appeal the learned

District Judge, Badarwah upheld the judgment of the trial Court and dismissed the appeal of the Appellants.

3. I have heard the learned Counsel for the parties.

4. On the question of fact, it is not seriously disputed by the learned Counsel for the Appellants that Mst. Thakri was the legally wedded wife of

Phulla Ram. He has, however, canvassed the proposition that the suit could not have been dismissed in consequence of abatement inasmuch as the

Plaintiffs had made a distinct application under Order 22, Rule 4 of the CPC within time. Even assuming that the Plaintiffs had failed to give the

names of the legal representatives of the deceased, that would not have justified the court to order the dismissal of the suit on this ground.

5. Shri C.L. Kotwal learned Counsel appearing for the Respondent has contended that Mst. Thakri was the only legal representative of the

deceased Phulla Ram and as the Plaintiffs had failed to bring on record Mst. Thakri in time, therefore, the only consequence was that the suit had

abated in terms of Order 22, Rule 4, Sub-clause (3) Code of Civil Procedure.

6. I am afraid the contention of the learned Counsel for the Defendants is not well founded. What a Plaintiff is required to do in terms of Order 22,

Rule 4 is that he has to make an application for substitution if the right to sue survives against the deceased Defendant. In the application he is

required to give the list of the legal representatives of the said deceased who are to be substituted in place of the deceased. If, however, an

exception is taken to the representatives sought to be brought on record by the adverse party and it joins issues with the Plaintiff either by

contending that the list is not exhaustive or a particular person is not the legal representative of the deceased and that there are other persons

whose names are omitted by the Plaintiff, then in that case the court has to make an enquiry under Rule 5, which provides that when a question

arises as to whether any person is or is not the legal representative of the deceased Plaintiff or the deceased-Defendant, such question shall be

determined by the court. In the instant case, it is noticed that the character of Mst. Thakri to be the legal heir of the deceased was the bone of

contention between the parties. The Defendants averred that Mst. Thakri was the legal heir of the deceased whereas this was denied by the

Plaintiffs as they asserted that Mst. Thakri was not the legally wedded wife of the deceased. The trial court, however, on enquiry found that Mst.

Thakri was the widow of the deceased and, therefore, being the legal heir of Phulla Ram, should have been substituted in his place. But while doing

so, it dismissed the suit as having abated. This procedure adopted by the learned Judge was wholly unwarranted. This would not have justified the

trial court as also the appellate court to dismiss the suit. Both the courts below have, therefore, taken erroneous view of the law on the subject. In

AIR 1945 Oudh 196, a Division Bench of the Court observed that where an application for bringing the legal representatives of the deceased

Respondent was made within the period prescribed, the mere fact that the list of the legal representatives mentioned in the application was not

exhaustive would not operate to abate the proceedings against the deceased-Respondent. If the Appellant brings on record within limitation those

persons whom he considers to be the legal representatives of the deceased-Respondent, the estate of the deceased would be sufficiently

represented and any decree passed would be effective to the extent of the property of the deceased and will be binding on the legal representatives

not brought on record.

7. As observed above, according to the Plaintiffs they were the legal representatives of the deceased and they did not admit Mst. Thakri as such.

But when the other side objected and pointed out to the court that Mst. Thakri was the widow of the deceased and was the only representative of

the deceased the court naturally embarked upon an enquiry and decided the question under Rule 5. I, therefore, fail to see how the suit could be

said to have abated.

8. The result is that the appeal is allowed, the judgment and the decrees of the courts below are Hereby set aside and the case is sent back to the

trial court with the direction that it will bring on record Mst. Thakri as the legal representative of the deceased Phulla Ram and will proceed with

the trial of the case from the stage it had left. Parties are directed to appear

before the trial court on May 19, 1978.