

(2008) 04 AHC CK 0184

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 42051 of 2001

Suresh Chand Yadav and others

APPELLANT

Vs

Waqf Nawabia, Agra Through Its Manager And Mutawallies
and others

RESPONDENT

Date of Decision : 23-04-2008

Acts Referred:

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

Citation : (2008) 04 AHC CK 0184

Hon'ble Judges : Dilip Gupta, J

Final Decision : Allowed

Judgement

Dilip Gupta, J.—Suit No. 762 of 1969 was filed for eviction and recovery of arrears of rent. The petitioners are the heirs of defendant No. 1 Shiv Narain who alone contested the suit. Defendant Nos. 2 and 3 did not contest the suit and nor did they file any written statement. The suit was decreed exparte on 29th January, 1974. Feeling aggrieved, defendant No. 1 Shiv Narain filed a Revision. The plaintiffs were arrayed as respondents and defendant Nos. 2 and 3 Shanker Lal and Ram Prasad were also arrayed as proforma respondents. The Revision was allowed by the judgment and order dated 23rd March, 1985 and the exparte decree was set aside.

2. Subsequently, in the suit, the plaintiffs moved an application dated 23rd March, 1985 for a declaration that the judgment and order dated 23rd March, 1985 is a nullity since during the pendency of the Revision, Shanker Lal and Ram Prasad who were respondents had died but their heirs and legal representatives were not brought on record. The Judge, Small Causes Courts rejected this application filed by the plaintiffs on 2nd November, 1992 but the Revision filed by the plaintiffs was allowed on 31st July, 2001. The judgment and order dated 2nd November, 1992 was set aside and it was further ordered that the execution shall proceed on the basis of the exparte decree dated 29th January, 1974.

3. This petition has been filed by the heirs and legal representatives of Shiv

Narain defendant No. 1 for setting aside the judgment and order dated 31st July, 2001.

4. Sri Madhav Jain, learned Counsel appearing for the petitioners submitted that defendant Nos. 2 and 3 had not contested the suit and nor did they file any written statement whereas defendant No. 1 alone contested the suit and filed the written statement. The suit had been decreed *ex parte* on 29th January, 1974 against all the defendants but defendant No. 1 Shiv Narain alone filed the Revision for setting aside the *ex parte* decree in which, apart from the plaintiffs, defendant Nos. 2 and 3 were also arrayed as proforma respondents and so even if the proforma respondents died during the pendency of the Revision, the judgment and order dated 23rd March, 1985 by which the *ex parte* decree was set aside would not be a nullity. He, therefore, submitted that the learned Judge, Small Causes Courts was justified in rejecting the application filed by the plaintiffs for declaring the said order as a nullity but the Revisional Court committed an illegality in allowing the Revision.

5. Sri Saheb Tewari, learned Counsel appearing for the plaintiffs/respondents, however, submitted that if the heirs and legal representatives of the respondents Shanker Lal and Ram Prasad were not brought on record then in that case the judgment and order by which the *ex parte* decree was set aside would be a nullity and, therefore, the Revisional Court committed no illegality in allowing the Revision. In support of his contention he has placed reliance upon the decisions of the Supreme Court in *State of Punjab v. Nathu Ram* AIR 1962 SC 89 and *Babu Sukhram Singh v. Ram Dular Singh and others* AIR 1973 SC 204.

6. I have carefully considered the submissions advanced by the learned Counsel for the parties.

7. It is not in dispute that defendant Nos. 2 and 3 namely Shanker Lal and Ram Prasad did not contest the suit and nor did they file any written statement in the suit. The suit was contested only by Shiv Narain defendant No. 1 who filed the written statement. The suit was decreed *ex parte* against all the defendants. Defendant No. 1 alone filed the Revision to set aside the *ex parte* decree and the grounds for setting aside the *ex parte* decree were common to all the defendants. In the Revision, apart from the plaintiffs, defendant Nos. 2 and 3 Shanker Lal and Ram Prasad were also impleaded as proforma respondents. No relief was claimed against them and nor could it be claimed because as codefendants they would only support the Revisionist for getting the *ex parte* decree set aside.

8. It is, thus, clear that defendant Nos. 2 and 3 were proforma respondents in the Revision. The Revision would not abate on the death of proforma defendant Nos. 2 and 3. In this connection reference may be made to the decision of the Supreme Court in *Kanhaiyalal v. Rameshwar and others* AIR 1983 SC 503, wherein it was observed:

".....Mr. Naunit Lal submitted that the appellant is the heir of the surety, contesting surety's liability and the appellant was not seeking any relief against

the original judgmentdebtor who was a proforma respondent. It was urged that the failure to implead the legal representatives of a proforma respondent against whom no relief is claimed would not have the effect of abating the appeal preferred by the present appellant. The heir of surety was contesting his liability to satisfy the decretal debt. The appellant claimed no relief against the proforma judgmentdebtor. The judgmentdebtor is contesting his liability with which we are not concerned. By the death of proforma respondent judgmentdebtor right to sue does not revive against him or his heirs and their presence was unnecessary and the appeal can proceed in their absence. Therefore, the High Court was clearly in error in holding that the appeal would abate on the sole ground that the heirs of the deceased judgmentdebtor proforma respondent No. 2 were not substituted in time. No substitution was necessary and appeal could have been proceeded with in the absence of the deceased judgmentdebtor and disposed of on merits."

(Emphasis supplied)

9. This Court in *Jai "Shanker Pd. v. Jagdish Upadhaya and others* 1982 (8) ALR 78, in view of the decision of the Supreme Court in *Mahabir Prasad v. Jage Ram* AIR 1971 SC 742 also held that the appeal will not abate if the legal heirs and representatives of the proforma respondent are not brought on record:

"Mr. Triloki Nath, learned Counsel for the plaintiffappellant relied on a decision of the Supreme Court in *Mahabir Prasad v. Jage Ram* AIR 1971 SC 742, and contended that it was open to the plaintiffappellant to have appealed from the decree without impleading Ram Das as a respondent inasmuch as the decree of the Trial Court proceeded on a ground common to all the plaintiffs and if the plaintiffappellant had done so, there was nothing in the Civil P.C. to prevent the Lower Appellate Court from reversing or varying the decree of the Trial Court in favour of all the plaintiffs under Order XLI, Rule 4 of the Civil P.C. It was urged that in a case to which Order XLI, Rule 4 of the Civil P.C. is applicable as aforesaid, it is not necessary for the appellant to implead the heirs and legal representatives of the deceased respondent, who is not a necessary party to the appeal but has been impleaded merely as a proforma respondent. The decision of the Supreme Court in *Mahabir Prasad's* case is a clear authority in support of the contention of Mr. Triloki Nath that the appeal did not abate on the death of Ram Das and could be heard as a whole at the instance of the plaintiffappellant; and the Appellate Court could in exercise of its power under Order XLI, Rule 4 of the Civil P.C., even reverse or vary the Trial Court's decree in its entirety, notwithstanding that the heirs and legal representatives of Ram Das were not before it."

(Emphasis supplied)

10. It also needs to be pointed out that the Revision had been filed by defendant No. 1 for the benefit of defendant Nos. 2 and 3 also because if the Revision was allowed, the result would be to their advantage. In such circumstances, the Revision will not abate on death of defendant Nos. 2 and 3 as was observed by

this Court in Smt. Bitto v. Ram Deo 1983 (9)A LR 551:

"Respondent No. 1 had also raised another preliminary objection before us. The same was that as respondents 16 and 17 had died during the pendency of the appeal in this Court, the appeal was liable to be abated. We do not agree with this submission. This appeal has been filed by the Bar Council of India not only for its benefit but for others as well. The result of the appeal will be to the advantage of the heirs of respondents 16 and 17. In fact, this question will have to be considered by the Trial Court while deciding the suit....."

11. This apart, defendant Nos. 2 and 3 had not filed any written statement in the suit. The Revision will not abate in view of the provisions of Order XXII, Rule 4 (4) CPC. This is what was observed by this Court in Mohammad Mustaqeem and others v. Aftab Ahmad and others 1983 (9) ALR 547:

"There used to be a great deal of controversy about the effect of not bringing on record the heirs and legal representatives of the defendant who did not either file the written statement or contest the suit. As a remedial measure Calcutta, Madras, Karnataka and Orissa High Courts had inserted a new subrule in Rule 4 of Order XXII, CPC to the effect that substitution of the legal representatives of a noncontesting defendant would not be necessary and the judgment delivered in the case would be as effective as if it had been passed when the defendant was alive. The Joint Committee of Parliament recommended for adoption of the said rule in Order XXII, Rule 4 Civil P.C. The recommendations made by it were:

"The Committee are therefore, of the view that in order to avoid delay in substitution of the legal representatives of the deceased defendant and consequent delay in the disposal of the suits, similar provision may be made in the Code itself. New subrule (4) in Rule 4 of Order XXII has been inserted accordingly."

The background which led to the insertion of subrule (4) of Order XXII is based on the recommendation of the aforesaid Committee. The intention of insertion is clear from the recommendations made by the Joint Committee. This was done with a view to curtail waste of unnecessary time. We have, therefore, to keep the intention of the Legislature in mind while interpreting subrule (4) of Order XXII Rule 4, CPC. It is now well established that intention of legislature, including the recommendations of the Joint Select Committee, can be considered and looked into for interpreting a legislation.....

.....The intention behind the subrule (4) of Rule 4 of Order XXII is that a plaintiff need not be asked to file an application for bringing on record the heirs of the deceased when he has not taken any interest in the suit. That intention could not be fructified if the suit is abated on the application for exemption not being made within 90 days. The expression used in subrule (4) is, "whenever it thinks fit". The word "whenever" means at whatever time or at what time so ever. To accept the interpretation put forward by the petitioners" learned Counsel would result in ignoring that expression altogether. The power to exempt is not inhibited by the

condition that the application for the said purpose must have been moved within 90 days. The exemption given by subrule (4) of Order XXII, Rule 4 relieves the plaintiff from the liability of moving a substitution application. It is a maxim of law that words of exemption are not to be construed to import any liability. The exemption granted excuses the plaintiff from the performance of duty. Accordingly, to me, it appears that moving of application within 90 days is not at all necessary, as was argued by the petitioners" learned Counsel."

(Emphasis supplied)

12. Thus, it was not necessary to bring on record the legal heirs and representatives of defendant Nos. 2 and 3 and the Revision did not abate.

13. In Babu Sukhram Singh the Supreme Court noticed that in the appeal, relief claimed was against all the defendants and, therefore, it was found that the appeal would abate. In the present case, as noticed hereinabove, the revisionist had not claimed any relief against the proforma respondents who were defendant Nos. 2 and 3. Likewise, the decision of the Supreme Court in Nathu Ram will also not be applicable.

14. In such circumstances the judgment and order passed by the Revisional Court dated 23rd March, 1985 by which the exparte decree was set aside would not become a nullity if the heirs and legal representatives of the proforma respondents had not been brought on record. The view to the contrary taken by the Revisional Court in the judgment and order dated 31st July, 2001 cannot be sustained.

15. Thus, for all the reasons stated above, the writ petition is allowed. The judgment and order dated 31st July, 2001 passed by the learned Additional District and Sessions Judge, Court No. 7, Agra in Revision No. 82 of 1993 is set aside.