

(2005) 07 J&K CK 0012
In the Jammu And Kashmir High Court
Case No : C.I.A. No. 5 of 2001

UCO Bank

APPELLANT

Vs

Jawahar Rice and General Mills and Others

RESPONDENT

Date of Decision : 19-07-2005

Acts Referred:

Jammu and Kashmir Civil Procedure Code, 1977 — Order 22 Rule 1, Order 22 Rule 10A, Order 22 Rule 4
Jammu and Kashmir Contract Act, 1977 — Section 37
Limitation (Amendment) Act, 1995 — Section 5

Citation : AIR 2006 J&K 57 : (2006) 1 JKJ 256

Hon'ble Judges : Nirmal Singh, J

Bench : Single Bench

Advocate : K.S. Puri, for the Appellant; Vikram Singh, for the Respondent

Final Decision : Allowed

Judgement

Nirmal Singh, J.—The relevant facts for the disposal of this appeal are that defendants 2 to 5 are the partners of M/s. Jawahar Rice &

General Mills, respondent No. 1. They approached the appellant bank for grant of financial assistance. The appellant bank accepted their proposal

for financial assistance and, accordingly, advanced an amount of Rs. 2,73,000/- with interest at the rate of 12% p.a. with quarterly rests for

construction of building and purchase of plant and machinery. Respondents 1 to 5 executed various documents including agreement of

hypothecation of goods in favour of the appellant bank. Respondent No. 6 and Khoju Ram stood as guarantors for respondents 1 to 5 and they

executed a guarantee deed that in case respondents 1 to 5 fail to re-pay the loan amount with interest they will be liable to re-pay the same.

Respondents 1 to 5 did not repay the loan amount on demand, therefore, the

Bank filed suit for recovery of Rs. 8,85,530.50.

2. On notice defendants 1 to 5 appeared and contested the suit. Issues were struck and appellant bank concluded the evidence. When the suit was

fixed for evidence of the defendants 1 to 5 they moved an application that the suit has abated as Khoju Ram, guarantor, had died 4/5 years back.

The learned trial Court, after relying on judgments dismissed the suit being abated.

3. I have heard the learned Counsel for the parties and perused the record.

4. The sole point for determination in this appeal is whether with the death of one of the defendants the suit will abate in its entirety when the cause

against other defendants survives. Order XXII Rule 1 of the CPC contains the procedure to be adopted in case of death of one party to the suit.

Rules 1 and 4 of Order 22 read as under:

1. No abatement by party's death, if right to sue survives : The death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives.

2 to 3. ...

4. Procedure in case of death of one of several defendants or of sole defendant :
(1) Where of two or more defendants dies and the right to sue

survives against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the

Court, on an application made in that behalf, shall cause the legal representatives of the deceased defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representatives of the deceased defendant.

(3) Where within the time limited by law no application is made under Sub-rule (1), the suit shall abate as against the deceased defendant.

(4) The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who

has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing, and judgment may, in such case,

be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been

pronounced before death took place.

(5) Where:

(a) the plaintiff was ignorant of the death of a defendant and could not, for that reason, make an application for the substitution of the legal

representatives of the defendant under this rule within the period specified in the Limitation Act, 1995, and the suit has, in consequence, abated,

and

(b) the plaintiff applies after the expiry of the period specified therefore in the Limitation Act, 1995 for setting aside the abatement and also for the

admission of that application u/s 5 of that Act on the ground that he had, by reason of such ignorance, sufficient cause for not making the

application within the period specified in the said Act, the Court shall, in considering the application under the said Section 5, have due regard, to

the fact of such ignorance, if proved.

5. Perusal of Rule 4 above makes it clear that where two or more defendants die and right to sue does not survive against the surviving defendant

or defendants, in that case the suit will abate but in case the right to sue survives against the surviving defendant or defendants, the legal

representatives of the deceased defendant should be substituted within the prescribed period and on failure to do so the suit shall abate against the

deceased defendant alone and suit shall not abate in its entirety. This proposition has been laid down by the Apex Court in Shahazada Bi and

Others Vs. Halimabi (since dead) by her LRs., by observing as under (Para 9):

Order 22, Rule 4, Civil P.C. lays down that where within the time limited by law, no application is made to implead the legal representatives of a

deceased-defendant, the suit shall abate as against a deceased defendant. This rule does not provide that by the omission to implead the legal

representative of a defendant, the suit will abate as a whole. What was the interest of the deceased defendant in the case, whether he represented

the entire interest or only a specific part is a fact that would depend on the circumstances of each case. If the interests of the co-defendants are

separate, as in case of co-owners, the suit will abate only as regards the particular interest of the deceased party.

6. In the instant case the defendants took loan from the appellant bank but failed to re-pay the same. The appellant-bank instituted a suit for

recovery of the loan amount. Admittedly the deceased Khoju Ram was a guarantor, who died during the pendency of the suit but the counsel did not inform the Court with regard to his death. Under Rule 10-A of Order 22 the CPC it is incumbent upon the lawyer to bring into the notice of the Court that his client has died. Otherwise also, even without impleading a guarantor a suit can be instituted against the principal debtor as the principal debtor is under obligation to perform his part of contract as is prescribed u/s 37 of the Contract Act. Section 37 of the Contract Act reads as under:

37. Obligation of parties to contracts : The parties to a contract must either perform or offer to perform, their respective promises, unless such performance is dispensed with or executed under the provisions of this Act, or of any other law.

Promises bind the representatives of the promisors in case of the death of such promisor before performance, unless a contrary intention appears from the contract.

A promise may be enforced by the legal representatives of the promisee in the event of death of such promisor before performance, unless a contrary intention appears from the contract.

7. In the instant case respondent No. 1 was constituted by four partners i.e. principal debtors and all the partners of the firm are alive, therefore,

they are under legal obligation to perform their part of the contract. So on the ground that one of the guarantors had died, on that account the suit

will not abate in its entirety. The learned District Judge has erroneously placed reliance on AIR 1966 SC 1427 and T. Raju Setty Vs. Bank of

Baroda, . Both these judgments are not applicable to the facts of this case. In Sri Chand's case the Apex Court was dealing with a case where

there were three sureties who had executed bond to satisfy the decree to be passed in the suit. The sureties took an objection that surety bond was

not registered and was not enforceable. The objection was over ruled by the High Court. The surety preferred SLP before the Supreme Court.

One of the sureties died and his legal heirs were not brought on record within the prescribed period and as the cause of action was not separable

the appeal was abated in its entirety but in the present case, as has been observed above, the cause to sue survives against the surviving

defendants, as such, suit against the principal debtors as well as the surviving guarantor will not abate and the suit against Khoju Ram, deceased, will alone abate.

8. For the reasons mentioned above this appeal is accepted. The order impugned is set aside. The learned District Judge is directed to proceed

with the case in accordance with law. Parties through their counsel are directed to appear before the trial Court on 5th August, 2005.