

(1988) 07 SHI CK 0001

In the High Court Of Himachal Pradesh

Case No : O.M.P. (M) No's. 31 and 404 of 1987 and 201 of 1988 (in Civil Suit No. 27 of 1987)

United Commercial Bank

APPELLANT

Vs

Dharam Paul Singh and Others

RESPONDENT

Date of Decision : 12-07-1988

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 22 Rule 4, Order 7 Rule 6, 153

Citation : AIR 1989 HP 56 : (1988) 2 ShimLC 269

Hon'ble Judges : V.P. Bhatnagar, J

Bench : Single Bench

Advocate : R.L. Sood, for the Appellant; A.K. Goel and D.D. Sood, for the Respondent

Final Decision : Allowed

Judgement

V.P. Bhatnagar, J.—This order is meant to dispose of three petitions viz. O.M.P. (M) No. 31 of 1987, O.M.P. No. 404 of 1987 and O.M.P. No. 201 of 1988.

2. The facts giving rise to the aforesaid three applications are not disputed. United Commercial Bank filed a Civil Suit on April 21, 1987 for the recovery of a sum of Rs. 2,44,996.95 P. for having advanced a truck loan to defendant 1 as the principal borrower against the guarantee furnished by defendants 2 and 3. Summonses issued to defendant 2 for July 9, 1987 were received back in the Registry with a report dt. May 26, 1987 that Shri Vinod Kumar, defendant 2, had died as back as on Mar. 18, 1986. It was on the above facts that the plaintiff - bank moved O.M. P. (M) No. 31 of 1987 under provisions of O. 22, R. 4 C. P. C for bringing on record the legal representatives of the said defendant. This application was filed in the Court on Oct. 9, 1987 along with O.M.P. No. 404 of 1987 u/s 5 of the Limitation Act praying for condonation of delay for bringing the proposed legal representatives of defendant 2, on record. The third petition bearing No. 201 of 1988 has been filed under the provisions of Section 151

C.P.C. praying that the main petition No. 31 of 1987 be taken to have been filed under the provisions of Order 1, Rule 10 C.P.C. also and disposed of accordingly.

3. There cannot be two opinions about the proposition of law that the civil suit having been filed against a dead person cannot be deemed to be a proper suit against his legal representatives, It is further well settled that the provisions of Order 22, Rule 4, C.P.C. cannot apply to a situation like this for the simple reason that defendant 2 was not alive on the day when the suit had been instituted. It is only if a defendant dies during the pendency of the suit that the said provisions can be invoked. The above position still leaves the question as to whether the legal representatives of defendant 2 can be now added as parties in this very civil suit or not under the provisions of Order 1, Rule 10, C.P.C. read with Section 153, C.P.C.

4. In my view, there is no legal impediment in bringing on record the legal representatives of a defendant who is shown to have died before the filing of the original suit for the simple reason that the plaintiff could in any case institute a fresh suit against those legal representatives on the day he moves an application for making them parties.

It has to be borne in mind that as many as three defendants were originally arrayed in the suit and further that the right to sue would survive against the other two defendants even if the name of defendant 2 is ordered to be struck from the array of the parties without bringing on record his legal representatives. If so, there is no conceivable reason why the legal representatives of defendant 2 should not be added as parties in this very suit so that the controversy against all of them can be adjudicated upon in one case. It is another question if it can be shown that the suit against the said legal representatives stands barred by limitation. But then, this question can certainly be decided when the parties are taken to trial on merits. This is specially so on account of the contents of the proviso to Section 21(1) of the Limitation Act, 1963. The said sub-section reads:

"21. Effect of substituting or adding new plaintiff or defendant. -- (1) Where after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party.

Provided that where the court is satisfied that the omission to include a new plaintiff or defendant was due to a mistake made in good faith it may direct that the suit as regards such plaintiff or defendant shall be deemed to have been instituted on any earlier date.

In other words, it would be open to the plaintiff to allege and prove certain facts in order to satisfy the Court that the omission to include the legal representatives was due to a mistake made in good faith. The plaintiff could also press into service some other grounds of exemption from Limitation Act as contemplated in Order 7, Rule 6, C.P.C. In the above view of the matter, I do not think that it would not be convenient or necessary to decide the question of limitation qua the

legal representatives before deciding these applications, as held by a learned single Judge of the Punjab and Haryana High Court in Jogindar Singh and Others Vs. Krishan Lal and Others, In fact, no hard and fast rule ought to be laid down on that aspect and it should be left to the discretion of the Court on the particular facts of a case whether the point of limitation should be decided in the first instance or along with the main suit. The principles governing the determination of some objections as preliminary issues would also have bearing on the point adverted to above. Where evidence is required to be taken before deciding the question of limitation, it may result into a protracted litigation and avoidable delay and inconvenience to the parties as well as the Court if the point of limitation has to be decided in advance in the first instance and, with all respect, I am prone to differ with the ratio of Joginder Singh's case (supra) inasmuch as it holds to the contra.

5. Coming back to the facts of the case in hand, I am satisfied that the applications moved on behalf of the plaintiff-bank should be allowed Shri Vinod Kumar, defendant 2, had stood guarantee for the loan and it cannot be expected that the plaintiff-bank would for all times keep itself informed as to whether he is alive or not. The fact that the suit was filed and the said defendant was arrayed as a defendant shows that the plaintiff-bank took, defendant 2 to be alive on that date. When it: came to know that his death, the applications under consideration were moved with all expedition. No prejudice would be caused to the legal representatives of defendant 2 on the point of limitation since they would be very much within their rights to raise the plea of limitation in their written statement and have a verdict of the Court in the matter.

6. For the above reasons, the applications in question are allowed to the extent that it is ordered that the name of Shri Vinod Kumar, defendant 2, be struck off from the array of defendants and in his place, his legal representatives be made parties. On the facts of this case, the plaintiff is further directed to amend his plaint so as to make suitable averments showing as to how the suit is within limitation against the said legal representatives. The application for amendment of the plaint be filed within the next two weeks with advance copy to the learned counsel on the opposite side who would file reply, if any, within a week after which the case will be placed before the court.