

Surinder Pal Singh Vs Puran Singh and Others

Court: High Court Of Punjab And Haryana At Chandigarh

Date of Decision: Nov. 11, 1994

Acts Referred: Civil Procedure Code, 1908 (CPC) â€” Order 22 Rule 9, Order 43 Rule 1

Citation: (1995) 109 PLR 473

Hon'ble Judges: N.K. Kapoor, J

Bench: Single Bench

Advocate: R.S. Bindra and Anita Garg, for the Appellant; M.L. Sarin Ashish Handa and Vikas Suri, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

N.K. Kapoor, J.

This judgment shall dispose of Regular Second Appeal Nos. 1602 and 1603 of 1979 as both these appeals are directed

against the judgment and decree dated 16.2.1979 of the Additional District Judge, Faridkot, whereby the order dated 29.1.1977 of the Sub Judge

1st Class, Faridkot, was affirmed.

2. Before examining the merit of the controversy raised in these appeals, it would be appropriate to briefly notice the broad facts of the case.

3. Surinder Pal Singh filed a suit against Puran Chand and others for possession of 1/5th share of land measuring 234 Kanals 10 Marias as per

details given in the heading of the plaint, situate within the revenue estate of village Bargari, Tehsil Faridkot. The suit was filed by the plaintiff

through his next friend Shamsher Singh. Later on, Gurcharan Singh, uncle of the plaintiff became his attorney for prosecuting the suit. Kuldip Singh,

defendant No. 8, father of the plaintiff, entered into an agreement with defendants No. 1 to 7 to sell the suit land to them. Before the sale deed

could be executed as per agreement to sell, plaintiff filed the present suit seeking possession of the land on the basis of title. Challenge was made to

the agreement to sell executed by his father on the ground that the plaintiff born on 15.7.1942 had attained majority at the time when agreement to

sell was executed by Kuldip Singh, father of the plaintiff, and thus such an agreement having been executed without any authority is void,

inoperative and ineffective qua the rights of the plaintiff and that the plaintiff is no where bound by any such agreement.

4. Contesting defendants put in appearance; filed written statement and pleaded that agreement was perfectly legal and valid and that the

possession had been given to them by Kuldip Singh, father of the plaintiff, in pursuance thereof.

5. During the pendency of the suit, Chand Singh, defendant No. 4, died in December, 1974. No application was filed by the plaintiff to bring on

record the legal representatives of deceased defendant till 31.3.1976. It is on 30.3.1976, according to the plaintiff, that Sh. Ranjit Singh, counsel

for the defendant, disclosed that Chand Singh had died on 20.12.1974 and thus prayed that he be given time to file an appropriate application for

dismissal of the suit on the ground that the same had abated. This disclosure by the counsel for the defendants alerted the plaintiff who immediately

brought an application on 31.3.1976 seeking setting aside the abatement as well as making prayer to bring on record the legal representatives of

Chand Singh defendant. In this composite application, prayer for condoning the delay in filing the application was also made. As regards the factum

of death of Chand Singh, it was stated in the application that the same came to his knowledge when counsel for the defendant made this disclosure.

Otherwise also, it was stated that the factum of death of Chand Singh could not come to the notice of the plaintiff or his Mukhtiar earlier as (a)

Chand Singh defendant used to reside at village Chand Baja which is approximately at a distance of 20/22 miles from village Bargari; (b) that

Chand Singh died at village Chand Baja; (c) none of Chand Singh's family members reside at village Bargari; (d) that plaintiff is residing in USA for

the last 15/16 years; (e) that Gurcharan Singh, Mukhtiar-i-am of the plaintiff as well as Shamsher Singh his previous next friend do not reside either

at village Bargari or Chand Baja; and (f) that Chand Singh used to reside at village Pindi Balochan which is at a distance of 20-25 miles from

Chand Baja and Bargari. Thus, there had been no negligence or mala fide on the part of the plaintiff or his Mukhtiar-i-am as they were not aware

of the factum of death of Chand Singh defendant.

6. Defendants contested the application. On the pleadings of the parties, following issues were framed :-

(1) "whether there is sufficient ground for condonation of delay in filing application for impleading legal representatives of defendant Chand Singh?

OPP.

(2) Whether the suit is liable to dismissal as wholly abated ? OPD.

(3) Relief.

7. In Support of the case, parties led evidence. The trial Court on appraisal of evidence led by the applicant came to the conclusion that had the

Mukhtiar of the plaintiff made prompt enquiry regarding the death of Chand Singh, the same would have come to his notice and thus the fact that

the plaintiff reside in a foreign country and his Mukhtiar is residing at Chandigarh by itself is no ground for condoning the delay prayed for nor the

same can be construed as sufficient cause in terms of section 5 of the Limitation Act. Dealing with the amendment made in Order 22 of the CPC

by the High Court of Punjab and Haryana dated 17.3.1975, it was held that it being procedural in nature cannot be applied retrospectively. Since

the suit had already abated, the applicant (plaintiff) cannot be given any benefit of the amendment whereby now a duty has been cast upon the heirs

of the deceased to bring on record the legal representatives of the deceased defendant. It was thus held that the suit has abated and the same was

ordered to be dismissed accordingly.

8. Before the lower appellate Court, plaintiff-appellant again urged that there was sufficient cause to condone the delay in filing the application and

the trial Court for no reason failed to exercise the jurisdiction thereby non suiting the plaintiff. According to the appellant, the trial Court clearly lost

sight of the fact that from 21.12.1974 till 30.3.1976 there were about 10-12 hearings in the suit at which Shri Ranjit Singh, counsel for the

defendants, had been appearing on behalf of Chand Singh but at no hearing made disclosure about the death of Chand Singh. Since Chand Singh

was permanent resident of Chand Baja as proved on record, his death could not come to the notice of plaintiff or his general attorney. In any case,

the appellant cannot be accused of negligence or lack of promptness in approaching this Court. In the present case, counsel for the defendants

disclosed the factum of death of Chand Singh defendant on 30.3.1976 and the application for bringing on record the legal representatives of

Chand Singh deceased; setting aside the abatement and condonation of delay was filed on 31.3.1976.

9. The lower appellate Court without specifically examining the points urged by the counsel for the appellant somehow chose to briefly notice the

ratio of the decision of this Court and other Courts and finally held as under:-

From the collective reading of the authorities reproduced above it emerges that there are not sufficient grounds in this case to condone delay of

more than ten months from the date of abatement. The plaintiff may be living in U.S.A. and his attorney at Chandigarh; Chand Singh friend of his

attorney at village Pindi Balochan. These facts are not sufficient to show that they were vigilant and had exercised due diligence and despite that

they could not know about the death of Chand Singh earlier than 30.3.1976. Even the permanent resident of Chand Singh deceased defendant at

Chand Baja is no sufficient ground to condone the delay because he cultivated land at Bargari.

Accordingly the application is dismissed.

10. Regular Second Appeal was admitted on 7.8.1979.

11. Before the matter could be examined, learned counsel for the respondents have raised a preliminary objection that the appeal is not

maintainable. Reliance was placed upon the decision of the apex Court in case reported as *Madan Naik (Dead) by Legal Representatives and*

Others Vs. Hansubala Devi and Others, . According to the counsel, the suit stood abated for want of substitution of legal representatives of Chand

Singh deceased within the period prescribed. Such a decision does not imply adjudication on merits and so any order passed cannot be construed

as a decree.

12. Counsel for the appellant, in all fairness, conceded that the appeal as such was not maintainable against such an order. However, he submitted

that this Court can treat this Regular Second Appeal as a revision and prayed accordingly.

13. Having considered the submissions made by the learned counsel for the parties, I am of the view that the Regular Second Appeal, in fact, was

not maintainable. Dismissal of an application for setting aside the abatement does not come within the ambit of a decree as defined u/s 2 of the

Code of Civil Procedure. The order passed under Order 2, Rule 9 of the CPC (for short "the Code") dismissing the application for setting aside

the abatement is not a decision on merits of the case. The order passed under Order 22 Rule 9 of the Code is appealable as per Order 43 Rule

1(k) of the Code. Plaintiff feeling aggrieved by the order dated 25.1.1977 filed an appeal. The trial Court while declining the application filed by

the plaintiff for bringing on record the legal representatives of deceased Chand Singh held that the suit as such abated and so dismissed the same.

Since the order has been passed under Order 22 Rule 9 of the Code, dismissal of suit was only consequential. Thus, the decision by the ,

Additional District Judge cannot take form of a judgment and decree and consequently second appeal was not maintainable against such a

"judgment and decree" of the Court below.

14. Even with regard to the maintainability of the revision, learned counsel for the respondents has urged that the orders of the Courts below do

not call for any interference as there is no basis to hold that the Courts below have exercised jurisdiction not vested in it by law or failed to exercise

its jurisdiction so vested or have acted in exercise of its jurisdiction illegally or with material irregularity. Reliance was placed upon the often quoted

judgment of the Supreme Court in case reported as *The Managing Director (MIG) Hindustan Aeronautics Ltd. and Another, Balanagar Vs.*

Ajit Prasad Tarway, .

15. Counsel for the appellant, however, submitted that as per evidence adduced by the appellant in support of his contention that he acted bona -

fidelity and with due diligence in filing the application for bringing on record the legal representatives of Chand Singh and for setting aside the

abatement which evidence has simply been over-looked and this way the Court has clearly acted illegally and with material irregularity which has

consequently resulted in failure of justice. This can be amply demonstrated by referring to the assertion made in this regard by the plaintiff which

stands un rebutted.

16. Counsel for the appellant in support of his above contention briefly referred the facts which led to the filing of the present suit and the defence

set up by the respondents. Referring to the factual aspects of the case, it was stated that the suit for possession was filed in 1968. Respondents

were duly served who put in appearance and filed written statement. Chand Singh deceased and other respondents were duly represented by their

counsel. From the date of death of Chand Singh in the month of December, 1974 till its disclosure by the counsel for the respondents on

30.3.1976, there was almost 10-12 hearings of the case yet for reasons best known to the respondents counsel or the respondents, the factum of

death of Chand Singh was not disclosed. Death of Chand Singh appears to have been purposely suppressed. Thus, as soon as the same came to

the notice of the plaintiff-present appellant-application for bringing on record the legal representatives of Chand Singh deceased was filed on

31.3.1976 with an additional prayer for setting aside the abatement and seeking condonation of delay in terms of Section 5 of the Limitation Act.

Evidence was led to prove that plaintiff had no knowledge of the death of Chand Singh nor he was negligent or not vigilant which evidence has,

however, been brushed aside with the curt observation that it was the duty of the plaintiff to enquire promptly regarding the death of Chand Singh

and it is no ground that the plaintiff is residing in USA or his Mukhtiar at a far off place at Chandigarh and such a fact does not constitute a

sufficient cause for condoning the delay in filing the application. According to the counsel, there is fallacy in the reasoning of the Courts below. Both

the Courts have proceeded on the premise that want of knowledge of death of person is by itself no ground for condonation. Whereas there can

be no challenge to this settled proposition, yet the matter ought to have been examined in the light of evidence adduced whether ignorance of death

is attributable to the negligence of the plaintiff or that he has been less vigilant. Support was sought from the decision of the Delhi High Court in

case reported as Nanak Chand Sood v. Union of India, etc. ILR 1978 Delhi 326.

17. Learned counsel for the respondents urged that the Courts below on evaluation of evidence have returned a finding that there are no sufficient

grounds for condoning the delay. Such a finding cannot be termed to be illegal or otherwise vitiated. Elaborating the counsel urged that as per facts

proved on record, Chand Singh died on 20.12.1974 whereas application for bringing on record the legal representatives was filed on 31.3.1976.

The application for bringing on record the legal representatives was to be filed within 90 days which time expired on 21.3.1975. Further, time for

setting aside the abatement of the suit i.e, 60 days too expired on 21.5.1975. So there was a delay of 10 months in filing the application and no

cogent reason has been assigned for this inordinate delay. Thus, the application was rightly dismissed by the Court and the appeal therefrom too

met the same fate. He further argued that no doubt the stringent provision contained in Rule 4 of Order 22 of the Code has been suitably modified

but the appellant/plaintiff cannot be given any benefit as the amended provisions are prospective in nature. The plaintiff-appellant also can not take

benefit of the amendment effected by the Punjab & Haryana High Court by insertion of Rule 2-A and 2-B under Order 22 of the Code vide

notification dated 17.3.1975 published on April 11, 1975. Accordingly, it was submitted that the appeal/revision petition being devoid of merit

deserves to be dismissed.

18. Facts as briefly noticed in the opening part of the judgment are not in dispute. Plaintiff who was residing at Los Angeles, California, filed the

present suit through Shamsher Singh, his general attorney. Suit remained pending before the trial Court for more than 6 years when Chand Singh,

one of the defendants, expired. Despite his death, counsel for Chand Singh kept on appearing before the Court on almost 10-12 hearings before

the factum of death of Chand Singh was disclosed by him before the Court. This alerted the plaintiff who filed an application for bringing on record

the legal representatives of Chand Singh and also prayed for setting aside abatement and for condonation of delay in terms of section 5 of the

Limitation Act. It was stated by the plaintiff that he had no knowledge of the death of Chand Singh as he had been residing at a different village.

Ignorance of his death is not attributable to his negligence. In fact, the plaintiff had been vigilant in filing one application for condonation of delay etc.

The trial Court despite having noticed that Chand Singh used to reside at village Chand Baja where he did too, yet chose to brush aside this

evidence with the laconic observation that the plaintiff or his Mukhtiar did not make any strenuous effort to enquire about the death of Chand

Singh. It was thus held by the trial Court that even if it be taken that Chand Singh died at Chand Baja, this cannot be taken to be sufficient for

condoning the delay in filing the application.

19. To the similar effect is the reasoning given by the lower appellate Court. There is no doubt that mere ignorance of death per se is not a

sufficient ground for setting aside abatement after the expiry of period prescribed under Article 120 and 121 of the Limitation Act. Before

ignorance of death can be deemed to be a good ground, there must exist good ground for ignorance not attributable to negligence of the party.

Since the duty is cast upon the person to bring on record the legal representatives of the deceased respondent within the prescribed period, mere

want of knowledge of death will be insufficient to secure him against consequences of abatement of his suit or appeal. The Courts below have

dismissed the application on the ground that mere ignorance of death is no ground to condone the inordinate delay in filing the application long after

the expiry of period of limitation prescribed. The Courts, however, have not examined or weighed the evidence led by the plaintiff; in support of his

contention that not only that he had no knowledge of the death of Chand Singh but he had been diligent in filing the application and at no time had

been careless or negligent This Court in case reported as Birbal and Ors. v. Harlal Sadasukh and Ors. (1953) 755 P.L.R. 331 Punjab 252 (DB)

had the occasion to examine the factum of ignorance of death of a party and it's a fact in terms of Order 22 Rules 4 and 9 of the Code and held as

under:-

... Now ignorance of the death of a party is a very good ground for not moving the Court to bring his legal representatives on record, for a person

cannot think of making an application in this behalf unless he knows that the party is dead. The defendants did not inform the Court and Surja's

counsel continued to appear on his behalf. The plaintiff stated on oath that he did not know of Surja's death until much later. In the circumstances,

it seems to me that the plaintiff has shown sufficient cause for not making the application in time, and the learned District Judge was justified in

extending limitation in this respect.

20. Delhi High Court in Nanak Chand Sood's case (supra) has also held that ignorance is now an excuse. If proved, ignorance of death can be

sufficient cause for condonation of delay.

21. The apex Court in case reported as Union of India (UOI) Vs. Ram Charan and Others, held that it is for the applicant to prove sufficient cause

that it learnt about the death of the opposite party. Mere allegation about the belated knowledge of the opposite party was held not to be a

sufficient cause for condoning the delay. It was held as under:-

...The provisions of the Code are with a view to advance the cause of justice. Or course, the Court, in considering whether the appellant has

established sufficient cause for his not continuing the suit in time or for not applying for the settling aside of the abatement within time need not be

over strict in expecting such of the suggested cause as it would accept for holding certain fact established, both because the question does not

relate to the merits of the dispute between the parties and because if the abatement is set aside, the merits of the dispute can be determined while, if

the abatement is not set aside, the appellant is deprived of his proving his claim on account of his culpable negligence or lack of vigilance. This,

however, does not mean that the Court should readily accept whatever the appellant alleges to explain away his default. It has to scrutinize it and

would be fully justified in considering the merits of the evidence led to establish the cause for the appellant's default in applying within time for the

impleading of the legal representatives of the deceased or for setting aside the abatement. It is true, as contended, that it is not duty of the appellant

to make regular enquiry from time to time about the health or existence of the opposite party, but it does not mean that the mere fact of the

appellant's coming to know of the respondent's death belatedly will, by itself, justify his application for setting aside the abatement. That is not the

law. Rule 9 of Order XXII of the Code requires the plaintiff to prove that he was prevented by any sufficient cause from continuing the suit. The

mere allegation about his not coming to know of the death of the opposite party is not sufficient. He had to state reasons which, according to him,

led to his not knowing of the death of the defendant within reasonable time and to establish those reasons to the satisfaction of the Court, specially

when the correctness of those reasons is challenged by the legal representatives of the deceased who have secured a valuable right on the

abatement of the suit.

22. The facts of the present case when tested in the light of the judicial pronouncements of the Courts leaves no manner of doubt that the plaintiff

had not been negligent in prosecuting the case nor careless in taking remedial steps as soon as factum of death came to his notice. It is proved on

record that Chand Singh used to reside at Chand Baja where he later on expired and this fact was not disclosed either by the respondents or by

their counsel till 30.3.1976. Strangely, the counsel kept on appearing on behalf of Chand Singh deceased in between hearings from 21.12.1974 to

30.3.1976. For such a conduct no plausible explanation has been given by the respondents. With such un rebutted material on record, it would be

appropriate to infer that the plaintiff was neither negligent nor careless. Plaintiff has been able to adduce evidence that he had no knowledge of the

death of Chand Singh as he had been living at a far off place and the factum of death of Chand Singh was not intentionally disclosed for almost 15

months by the respondents. Plaintiff had nothing to gain but to lose by not impleading the legal representative of Chand Singh. This aspect ought

also have to be weighed with the Courts below. The Courts below have over-looked the legislative intendment as reflected in the amended

provision vide which now it is the duty of respondent to bring on record the legal representatives of the deceased respondent. No doubt, the

amendment effected by the High Court of Punjab and Haryana was prospective in nature, yet the same was a clear indicator that these provisions

are intended to be construed more liberally.

23. Accordingly, I accept the appeal/revision petition, set aside the judgment and decree/order of the Courts below and allow the application of

the plaintiff filed under Order 22 Rule 9 of the Code, thereby restoring the suit and remit the case to the trial Court. Since the matter remained

pending for a pretty long time and that too against the order passed by the Courts below under Order 22 Rule 9 of the Code - (not with regard to

the merits of the controversy) - I direct the trial Court to expeditiously dispose of the suit without any delay, preferably within six months from the

receipt of the case file. No order as to costs.