Smt. Kamlesh Vs Tekchand and Others

Court: Allahabad High Court

Date of Decision: July 17, 2002

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Order 22 Rule 9, 151
Constitution of India, 1950 â€" Article 226

Citation: AIR 2003 All 299

Hon'ble Judges: S.P. Mehrotra, J

Bench: Single Bench

Advocate: Suneel Rai, for the Appellant; Standing Counsel, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

S.P. Mehrotra, J.
This writ petition has been filed by the petitioner, inter alia, challenging the order dated 11-1-2001 (Annexure No. 6 to

the writ petition) passed by learned First Addl. Civil Judge (Junior Division), Ghaziabad.

2. It appears that Original Suit No. 20 of 1984 was filed by one Tek Chand against Ram Bal and others. The said suit was dismissed by the

judgment and order dated 6-12-1988 by VIth Addl. Munsif, Ghaziabad. Thereupon, the plaintiff, Tek Chand (respondent No. 1 herein) filed an

appeal being Civil Appeal No. 198 of 1988. The said Civil Appeal No. 198 of 1988 was allowed by the learned IIIrd Addl. Civil Judge,

Ghaziabad by his judgment and order dated 30-1-1991 whereby the judgment and order dated 6-12-1988 was set aside, and the matter was

remanded for being decided afresh.

3. During the pendency of the suit after remand, it appears that Hemi, son of Raje (defendant No. 8 in the suit) died, and an application dated 18-

8-2000 (Annexure No. 3 to the writ petition) was filed on behalf of the defendants in the suit, inter alia stating that the said Hemi, Son of Raje

(defendant No. 8 in the suit) had expired in the year 1997, and the said suit had abated.

4. Thereafter, an application dated 7-9-2000 under Order XXII, Rule 9 and Section 151 of the CPC was filed on behalf of the plaintiff in the suit.

It was inter alia, stated in the said application dated 7-9-2000 that Ram Pal (defendant No. 5 in the suit) had expired, and the sole heir and legal

representative Ram Bal was already on record as defendant No. 1 in the said suit, it was, inter alia, further stated in the said application that Hemi,

son of Raje (defendant No. 8 in the said suit) had expired on 29-12-1997, and his heirs and legal representatives mentioned in the said application

be substituted. The prayer for condonation of delay u/s 5 of the Limitation Act was also made in the said application. The said application was

supported by an affidavit of Tek Chand (plaintiff in the said suit) sworn on 7-9-2000. The said affidavit is part of Anneuxre No. 4 to the writ

petition.

5. The objection dated 22-11-2000 supported by an affidavit (Annexure No. 5 to the writ petition) was filed on behalf of the defendants against

the application dated 7-9-2000 filed on behalf of the plaintiff in the suit.

6. By an order dated 11-1-2001, the learned 1st Addl. Civil, Judge, (Junior Division) Ghaziabad allowed the said substitution application filed on

behalf of the plaintiff, and rejected the objection filed on behalf of the defendants in the suit. Thereafter, the petitioner has filed this writ petition.

7. I have heard learned counsel for the petitioner. The impugned order was passed on 11-1-2001. This writ petition filed by the petitioner is highly

belated. Learned counsel for the petitioner submits that the explanation for delay is contained in paragraph No. 15 of the writ petition. I have

perused paragraph No. 15 of the writ petition. The explanation contained in the said paragraph is totally vague and lacking in material particulars.

The said paragraph does not contain any proper explanation for the delay. It merely says that the petitioner is an illiterate poor widow and

therefore, she could not manage to file this writ petition within time, and only after making the necessary arrangement she is filing this writ petition

before this Court. Thus, the petitioner has not been able to explain the inordinate delay in filing the writ petition. The petition is liable to be

dismissed on the ground of laches.

8. However, even otherwise, having perused the impugned order, I do not find that the learned Court below has committed any illegality in passing

the same. The learned Court below has rightly rejected the technical objection raised on behalf of the defendants that there was no specific prayer

for setting aside the abatement.

9. A perusal of the application dated 7-9-2000. (Annexure No. 4 to the writ petition) shows that the said application has specifically mentioned

that the same was being filed under Order XXII, Rule 9 and Section 151 of the Code of Civil Procedure. In the said application and its supporting

affidavit it is, inter alia, stated that as the defendant No. 8 had not been residing in the village at the time of his death, the plaintiff could not come to

know of the death of the defendant No. 8, and that the counsel for the defendants also did not inform regarding the death of the defendant No. 8

and as such, steps for bringing on record the heirs and legal representatives of the defendant No. 8 could not be taken within time and that the

delay in filing the substitution application be condoned, and the same be treated as within time.

10. Thus, having regard to the contents of the said application and its supporting affidavit. It is evident that the said application in substance is an

application for setting aside abatement. Therefore, the objection raised on behalf of the defendants regarding there being no prayer for setting aside

abatement, has no force.

11. In Babaji Padhan Vs. Mst. Gurubara Padhani and Others, . It was laid down as follows (Paragraphs No. 4 and 5 of the said AIR) :--

4. On the petitioner''s main point that no application for setting aside the abatement having been made the entire suit had abated -- Mr. A.B. Ray,

learned counsel for the plaintiff -- opposite party, submitted that an application for substitution without prayer for setting aside abatement is

maintainable. In support of his proposition he relied on certain decisions holding that an application made to bring the legal representatives of the

deceased defendant on record after the time prescribed therefore by law, should ordinarily be treated as an application to set aside the abatement

of the suit which has taken place though, it is not asserted that the delay was due to reasonable causes, and on proof of sufficient cause for delay

the application should be granted, in case, there where such an application is made after the death of a deceased party to bring his legal

representatives on the record and continue the proceedings, the application is in substance an application to set aside the abatement under Order

22, Rule 9, CPC and that the absence of a formal order of abatement is no obstacle thereto, that the Court has power to entertain such an

application and decide whether the applicant was prevented by sufficient cause from continuing the proceeding, under Order 22, Rule 9, Sub-rule

(2) independently of Sub-rule (3) Kripa Ram v. Bhagat Chand AIR 1928 Lah 746 . Lachmi Narain Vs. Muhammad Yusuf and Others,

5. Then, on the point whether there was sufficient cause for delay, it is a question of fact setting aside abatement is in the discretion of the trial

Court, and it should not ordinarily as in foe present case be interfered with that apart in the present case the legal representatives of the deceased

defendant No. 3 have not appeared to contest their substitution in the suit.

12. In Ningthoujam Ongbi Radhey Devi v. Lalaram Ningol Ninghoujam Ongbi Devi AIR 1970 Gau 70 it was laid down (Paragraph No. 5 of the

said AIR).

..... There is, however, abundant authority for the proposition that substitution of the legal representatives without first setting aside the

abatement would constitute a mere irregularity which does not vitiate the order. In other words, an application for substitution can legally be treated

as a composite application for setting aside the abatement and bringing the representatives of the deceased party on record. In this respect

reference may be made to the decisions in Diwan Chand v. Bhagwan Chand AIR 1937 Lah 455 and Babaji Padhan Vs. Mst. Gurubara Padhani

and Others, . .,.....

13. In Sri Ram Prasad Vs. The State Bank of Bikaner and Others, , it was laid down (Paragraph No. 5 of the said AIR):--

..... Moreover, in a case where an applicant applies for condoning the delay and for bringing on record the legal representatives, a prayer of

setting aside the abatement is implicit in the prayer for substitution.

In Bachan Ram and Others Vs. The Gram Panchayat Jonda and Others, it was held as follows (Paragraph No. 2 of the said AIR):--

2. The surviving plaintiffs as also the legal representatives of Har Chand Singh deceased have filed this second appeal against the order of the

Court of first appeal holding that the appeal had partially abated in respect of Harchand Singh''s land. It is the contention of the learned counsel for

the appellants, Sri Dhillon, that the application for impleading the legal representatives of Harchand Singh had been made while the period of

limitation of 60 days provided by Article 121 of the Limitation Act 1963, had not expired and that the application should have been treated by the

lower appellate Court is an application for setting aside of the abatement which had automatically taken effect on the expiry of the period of 90

days allowed by Article 120 ibid. In support of this contention Sri Dhillon has relied upon Kirpa Ram v. Bhagat Chand AIR 1928 Lah 746 which

had followed two earlier decisions in Badlu v. Mt. Naraini AIR 1924 Lah 424 and Ata-ur-Rahman v. Mushkur-un-Nisa AIR 1926 Lah 474. It

was held that an application made to bring the legal repre-sentatives of the deceased defendant defendant on record after the time prescribed

therefore by law should ordinarily be treated as an application to set aside the abatment of the suit which has taken place even though it is not

asserted that the delay was due to any reasonable cause. The evidence about the sufficient cause for the delay can be produced in the appellate

Court and all that is necessary is that the Court should feel satisfied that discretion should be exercised in favour of the party seeking the setting

aside of the abatement.

14. In Smt. Shakuntala Devi Vs. Banwari Lal and Others, , it was laid down as under (Paragraph Nos. 4 and 5 of the said AIR) :--

4. Learned counsel appearing on behalf of the applicant has contended that the application made on the 9th of July, 1962 for substituting the heirs

and legal representatives of respondent Banwari Lal implied a prayer for setting aside the abatement and permitting the proceedings to continue

against the heirs and legal representatives sought to be brought on the record. In support of his contention, the learned counsel again placed

reliance on the decision in Lachmi Narain Vs. Muhammad Yusuf and Others, . He urged that the Court below had without any legal justification

distinguished that decision which was binding on him. He further placed reliance on the decision of the Orissa High Court in Babaji Padhan Vs.

Mst. Gurubara Padhani and Others, . The decision of this Court in Lachmi Narain Vs. Muhammad Yusuf and Others, and another decision of the

Lahore High Court in Kirpa Ram v. Bharat Chand AIR 1928 Lah 746 were followed in this decision with approval of Orissa High Court. I agree

with the contention that the Court below wrongly distinguished the decision of this Court in Lachmi Narain Vs. Muhammad Yusuf and Others, and

held that the application dated 9-7-1962 could be treated as an application for setting aside the abatement and for bringing on record the heirs and

legal representatives of the deceased respondent Banwarl Lal.

5. Learned counsel appearing on behalf of the applicant further contended that merely because the application dated 18th March, 1964 praying for

setting aside the abatement did not contain a formal prayer for condoning the delay did not bar the court from treating it as an application u/s 5

Limitation Act and from taking into account the relevant material on record for the purpose of deciding as to whether the applicant had sufficient

cause for condonation of delay in making the application for substitution and for applying for setting aside the abatement of the appeal, In support

of the contention that a formal application u/s 5 of the Limitation Act is not necessary to enable the Court to decide whether delay deserves to be

condoned or not learned counsel appearing on behalf of the applicant has relied on the decision of the Punjab High Court in Firm Kaura Mal

Bishan Dass Vs. Firm Mathra Dass Atma Ram, Ahmedabad and Others, :--

Merely because there was no written application filed by the appellant is hardly a sufficient ground for refusing him the relief, if he is otherwise

entitled to it. Procedure is meant for advancing and not for obstructing the cause of justice, and if the entire material is on the record, it cannot

promote the ends of justice, if that material is ignored and the relief refused to the appellant, merely because he had not claimed it by means of a

formal application in writing or that a formal affidavit was not filed. The language of Section 5 also does not provide that an application in writing

must be filed before relief under the said provision can be granted.

In the above mentioned decision, reliance was placed on the Division Bench decision of this Court in Mt. Kulsoomun Nissa and Another Vs. Noor

Mohammad alias Sultan Haider and Another, . The submission made is supported by two decisions cited above and must consequently prevail.

15. In Kunhikayyumma and Another Vs. Union of India (UOI) and Others, , it was held in follows (Paragraph Nos. 6 and 12 of the said AIR) :--

6. That the Court should not attach undue importance to the frame the petition has been fairly established by a series of decisions touching that

aspect. The lower appellate Court has already referred to the decisions in Bachan Ram and Others Vs. The Gram Panchayat Jonda and Others,

and Delhi Development Authority Vs. Raghunath Sahai Gupta, The Punjab decision has considered earlier decisions on the point Kirpa Ram v.

Bhagat Chand AIR 1928 Lah 746 which in turn had followed the decisions in Badlu v. Mt. Naraini AIR 1924 Lah 424 and Ataur-Rahman v.

Mushkurun-Nisa AIR 1926 Lah 474 The gist of the decisions was summarised by Suri, J. in that decision in the following words :

It was held that an application made to bring the legal representatives of the deceased defendant on record after the time prescribed therefore by

law should ordinaryily be treated as an application to set aside the abatement of the suit which has taken place even though it is not asserted that

the delay was due to reasonable cause. The evidence about the sufficient cause for the delay can be produced in the appellate Court and all that is

necessary is that the Court should feel satisfied that discretion should be exercised in favour of the party seeking the setting aside of the abatement.

Following the decisions in AIR 1928 Lah 746 and Lachmi Narain Vs. Muhammad Yusuf and Others, the Orissa High Court took the same view in

Babaji Padhan Vs. Mst. Gurubara Padhani and Others, . Trivedi J. in Sri Ram Prasad Vs. The State Bank of Bikaner and Others, observed :

..... in a case where an applicant applies for condoning the delay and for bringing on record legal representatives, a prayer of setting aside the

abatement is implicit in the prayer for substitution.

AIR 1933 85 (Nagpur) is yet another case accepting the above principle.

I am in agreement with the views so expressed in the aforesaid decisions.

12. The decision of the Supreme Court in Union of India (UOI) Vs. Ram Charan and Others, , on which reliance was placed by counsel for the

appellants is not as absolute as may be thought of at first sight, No doubt, the insistence on there being sufficient cause forgetting aside the

abatement had been highlighted in that decision. However, a close reading of para 12 of the judgment, particularly the last sentence thereof, would

point out that the position is not one of absolute inflexibility. That clearly is the effect of the following passage contained therein.

If no such facts are alleged, none can be established and in that case the Court cannot set aside the abatement of the suit un-less the very

circumstances of the case make it so obvious that the Court be in a position to told that there was sufficient cause for the applicant''s not continuing

the suit by taking necessary steps within the period of limitation.

In other words, even if an applicant does not allege or prove facts making out a sufficient reason for not making the application for bringing on

record the legal representatives of the deceased within the stipulated time, the Court would not be powerless to render justice when it is satisfied

that circumstances of the case are obviously, such which would justify a finding of sufficient cause to be taken by the Court, The lower appellate

Court also has approached the facts of the case by adhering to such a principle as will be evident from the extract in its judgment referred to in

paragraph 4 (supra). The circumstances have been considered from that angle. The finding of sufficient cause has been reached on a proper

application of the correct legal principle and on exhaustive consideration of the circumstances in the case I am in full agreement with the approach

and conclusion taken by the Court below on this aspect. There is no error whatever in the judgment of the Court below, much less a substantial

error of law which alone would justify interference in second appeal.

16. These decisions thus, support the conclusion drawn above that it is the substance of the application and its supporting affidavit which should be

examined. If examination of substance of the application and its accompanying affidavit shows that the prayer for setting aside abatement is implicit

therein then it is not material that there is no explicit prayer for setting aside abatement.

17. The writ petition, thus, lacks merit, and the same is liable to be dismissed.

18. In any case, on the facts and circumstances of the case, it is not a fit case for interference under Article 226 of the Constitution of India.

19. In view of the aforesaid discussion, the writ petition is dismissed.