

* HIGH COURT OF DELHI : NEW DELHI

FAO. No.42/2008 & CM No. 1368/08

% Judgment reserved on: **10th November, 2009**

Judgment delivered on: **22nd January, 2010**

1. S. Gurbaksh Singh
S/o. S. Tej Singh
B-45, Greater Kailash I
New Delhi 110048
2. S. Baljit Singh Shahpuri
S/o. S. Tej Singh
B-262, Greater Kailash-I
New Delhi
3. (i) Shri Gulraj Singh
S/o. Late Sher Bahadur Singh Shahpuri,
S-368, Greater Kailash, Part-II,
New Delhi
- 3.(ii) Tejwinder Kaur
D/o. Late Sher Bahadur Singh Shahpuri,
S-368, Greater Kailash, Part-II,
New Delhi.
4. S. Daljit Singh Shahpuri
S/o. S. Tej Singh
C-460 Defence Colony,
New Delhi.
5. Smt. Devinderbir Kaur, D/o. S. Tej Singh
And wife of Kanwarpal Singh Kochhar,
124, Sunder Nagar, New Delhi.
6. Smt. Harbans Kaur, D/o. S. Tej Singh
And wife of late S. Hardial Singh,
176, Tagore Garden,
New Delhi.
7. Smt. Kulbir Kaur, D/o. S. Tej Singh
And wife of S. Gurpartap Singh,

D-9, Pamposh Enclave, New Delhi.

...Appellants

Through: Mr. H.L. Tiku, Sr. Adv. with
Ms. Yashmeet, Adv.

Versus

1. Shri N.G. Nanda,
S/o. Shri Gulzari Lal Nanda,
1168, Sector 27
Shivam Society
Gandhi Nagar
Ahmadabad.

2. Shri Vivek Nanda,
S/o. Shri N.G. Nanda,
1168, Sector 27
Shivam Society
Gandhi Nagar
Ahmadabad.

...Respondents

Through: Mr. Sunil Mittal and
Ms. Maldeep Sidhu, Adv.

Coram:

HON'BLE MR. JUSTICE V.B. GUPTA

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| 1. Whether the Reporters of local papers may
be allowed to see the judgment? | Yes |
| 2. To be referred to Reporter or not? | Yes |
| 3. Whether the judgment should be reported
in the Digest? | Yes |

V.B.Gupta, J.

Appellants have filed this appeal against order dated 23rd April, 2007,
passed by Additional District Judge, Delhi vide which it was held that suit filed
by appellants stood abated.

2. Brief facts as alleged are that respondent No.1, entered into an agreement to sell dated 14th November, 1979 with Sh. Tej Singh, (father/Grandfather of the appellants), in respect of property bearing No.C-23, Chirag Enclave, New Delhi. Sh. Gulzari Lal Nanda, father of respondent No.1, assured Sh. Tej Singh that respondent No.1 would honour the commitment made in the agreement. Since completion of sale was delayed and in the meantime, Sh. Tej Singh died, appellants filed suit for specific performance against respondent No.1 and Sh. Gulzari Lal Nanda (who was defendant no. 2 in the suit)

.3 In or around September 1983, Mr. Vivek Nanda, s/o. respondent No.1 filed an application for impleadment on the ground that suit property is HUF. Court vide order dated August 29, 1984, allowed that application and he was, impleaded as respondent No.2. In the meanwhile, Sh. Gulzari Lal Nanda died on January 15, 1998.

4. On account of pecuniary jurisdiction, matter was transferred to District Court to be listed on May 6, 2004. Appellants being unaware could not appear before the court. Counsel for respondent No.1, for the first time informed the Court on September 20, 2004, that Sh. Gulzari Lal Nanda has died.

5. The suit was dismissed in default on October 26, 2004.

6. Appellants became aware of the dismissal of the suit only on November 30, 2004 and filed application for restoration. On inspection of record it was found that Sh. Gulzari Lal Nanda has passed away and accordingly, an application under Order 22 Rule 4 of Code of Civil Procedure (for short as 'Code') was filed for impleading his wife, in place of deceased Sh. Gulzari Lal Nanda.

7. Respondents filed reply to that application stating that suit has already abated w.e.f. April 16, 1998.

8. Appellants thereafter, filed an application under Order 22 Rule 9 of the Code seeking setting aside of abatement and for bringing Smt. Laxmi Nanda on record, in place of deceased Sh. Gulzari Lal Nanda.

9. Trial court, vide impugned order disallowed the application of the appellants for setting aside the abatement.

10. It is contended by learned counsel for appellants that deceased Sh. Gulzari Lal Nanda, is survived by his wife and his son. The son is already on record arrayed as respondent No.1 and thus, the suit could not have abated.

11. Other contention is that counsel for defendants had appeared for both the defendants (i.e. defendant No.1 and defendant No.2, Sh. G.L. Nanda) on 16th May, 2001, 17th May, 2001 and 18th May, 2001 in the trial court but never informed the Court that defendant No.2 had expired and

they are not appearing for defendant No.2. Appellants were informed about the demise of defendant No.2, for the first time on September 20, 2004 and application for substitution for bringing legal heirs on record was filed thereafter.

12. Other contention is that appellants never prayed for any decree of Specific Performance against defendant No.2, Sh. Gulzari Lal Nanda. Relief of Specific Performance is only against respondent No.1 herein. Lastly, appellants never sued deceased defendant No.2 and respondent No.1, as two coparceners. Since respondent no.1, who is the legal heir of deceased defendant No.2, was already on record, the suit could not have abated.

13. In support of its contentions, learned counsel for appellants cited following judgments,;

**(i) *Mahabir Prasad v. Jage Ram and Ors.*;
*AIR 1971 SC 742.***

(ii) *Mohd. Hussain (Dead) By LRs & Ors. v. Occhavlal and Ors.*;(2008) 3 SCC 233 and;

**(iii) *Bhavsingh (Dead) by LRs. v. Keshar Singh and Ors.*;
*AIR 2003 SC 3199.***

14. On the other hand, it is contended by learned counsel for respondents (who has filed written arguments also) that suit of the appellants stood automatically abated in accordance with provisions of sub-Rule 5 of Rule 4 of order 22 of the Code against Sh. Gulzari Lal Nanda (defendant no. 2) alone on 16th April, 1998. Admittedly, no

application was made under order 22 Rule 4 (3) of the Code within the prescribed period. The application moved on 4th October, 2005 for setting aside the abatement was barred by limitation. There is absolutely no averment in the application under Order 22 Rule 9 CPC of the Code as to why appellants remained ignorant about the date of automatic abatement of suit from 16th April, 1998 to 30th November, 2004.

15. Other contention is that Sh. Gulzari Lal Nanda died on 15th January, 1998 and his demise was widely published in the media for the reason that he was the Home Minister and also the acting Prime Minister in 1964 and again in 1966. No application was filed by the appellants for bringing on record in place of deceased Sh. Gulzari Lal Nanda, his legal representatives within the period of limitation. Thus, appellants' application under Order 22 Rule 9 of the Code was rightly dismissed by the trial court, as barred by Limitation.

16. It has been further stated in the written arguments that automatic abatement of the suit against defendant no. 2 stands intact. But the effect of this abatement is limited to defendant no. 2 alone. As far as respondent no. 1 is concerned, the right to sue survived against him. Notwithstanding such survival, the suit could not proceed against respondent no. 1, because the liability to perform to contract of sale was joint and coextensive vis.a.vis both the defendants. If the suit against defendant no. 2 (the joint

promisee) had abated, it could not proceed further against respondent no. 1 alone. It had, therefore, to be dismissed qua respondent no. 1.

17. In support of its contention, learned counsel for respondents cited following judgments;

- (i) *State of Punjab v. Nathu Ram;*
AIR 1962 SC 89.
- (ii) *Madan Naik (dead by LRs) and Ors. v. Mst. Hansubala Devi & Ors.;*
AIR 1983 SC 676.
- (iii) *Union of India v. Ram Charan (deceased) through his LRs.;*
AIR 1964 SC 215 and
- (iv) *Union of India v. Kundan;*
AIR 1977 Delhi 38.

18. Relevant provisions of the Code for deciding the controversy between the parties are Order 22 Rule 1, 4, 9 (1) and 10A, which read as under:-

“Rule 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”.

“Rule 4 :-Procedure in case of death of one of several defendants or of sole defendant:-

(1) Where one of two or more defendants dies and the right to sue does not survive 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 representative 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 representative 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 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 representative of the defendant under this rule within the period specified in the Limitation Act, 1963 (36 of 1963), and the suit has, in consequence, abated, and

(b) The plaintiff applies after the expiry of the period specified therefore in the Limitation Act, 1963 (36 of 1963), for setting aside the abatement and also for the admission of that application under section 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.

“Rule 9 (1) :-Effect of abatement or dismissal

(1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.”

“Rule 10A:-Duty of pleader to communicate to Court death of a party

- (1) Whenever a pleader appearing for a party to the suit comes to know of the death of that party, he shall inform the Court about it, and the Court shall thereupon give notice of such death to the other party, and, for this purpose, the contract between the pleader and the deceased party shall be deemed to subsist”.

19. As per Rule 1 of Order 22 of the Code, there shall be no abatement by parties death if, right to sue survive, while as per Rule 4 of Order 22 of the Code, where one of several defendants dies and right to sue survive, the Court on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit. This rule also provide that where the plaintiff was ignorant of the death of a defendant, and could not, for that reason, make an application for substitution of the legal representative of the defendant within the period specified in the Limitation Act, 1963, and the suit has, in consequence, abated and the plaintiff applies after the expiry of the period specified therefore in the Limitation Act, 1963 for setting aside the abatement, the Court shall, in considering the application under Section 5 of the Limitation Act, have due regard to the fact of such ignorance, if proved.

20. Under Rule 10 (A) of Order 22 of the Code, it is the duty of the pleader to communicate to the Court about the death of a party. Whenever a pleader appearing for a party comes to know of the death of that party, he shall inform the Court about it.

21. It is an admitted fact, that defendant no.2 (Sh. G. L. Nanda), died on 15th January, 1998 and application for substitution of his legal heirs was to be filed with the period of limitation.

22. Appellants' case is that in order dated 20th September, 2004 it has been recorded that defendant no. 2 (Sh. G. L. Nanda) has expired. Appellants were not aware of the death of defendant no.2 and have come to know of his death only on November, 30, 2004, when record was inspected. It is also appellants' case that counsel for defendant no.1 and no. 2 had been appearing regularly, even after the death of defendant no. 2.

23. As stated above, under Order 22 Rule 10 (A) of the Code, it was the duty of the counsel to communicate to the Court about the death of his party. As per copies of order sheets placed on record, even after the death of defendant no. 2, his counsel had been appearing in the Court on his behalf, as apparent from some of the order sheets, which are reproduced as under:

“16.5.2001.

Present: None for the plaintiff.

Mr. Arun Mohan, Sr. Advocate with

Ms. Deep Mala for defendant No. 1 & 2.

Suit No. 1395/82.

List on 17.5.2001 for directions.

C. K. Mahajan J”

“17.5.2001.

Present: None for the plaintiff.

Ms. Deep Mala for defendant No. 1 & 2.

Suit No. 1395/82.

List for directions on 18.5.2001 for directions.

C. K. Mahajan J”

“18.5.2001.

Present: Ms. S. Kaur for the plaintiff.

Mr. Arun Mohan, Sr. Advocate with

Ms. Deep Mala for defendant No. 1 & 2.

Suit No. 1395/82.

The case is already listed in the category of “final”
at SI. No. 16.

The same be taken up at its own turn.

C. K. Mahajan J”

“23.7.2003.

Present: None for the plaintiff.

Mr. Arun Mohan, Sr. Advocate with

Mr. Arvind Bhatt for defendants.

Suit No. 1395/82.

In view of Section 2 of Delhi High Court
(Amendment) Act, 2003 let this matter be listed
before JR on 7/8/2003 for further directions.

R. C. Chopra J”

24. As per order sheet dated 20th September, 2004, it came on record for the
first time, that defendant no. 2 has expired. This order sheet read as under;

“20.9.2004.

Present: Counsel for the plaintiff.

Counsel for defendant no. 1.

None for defendant No. 2.

Defendant no. 2 has expired. Counsel for the defendant no. 2 reported that he has returned the brief to the defendant no. 2. None appeared for defendant no. 2. It is going to be 1.00 P. M. Adjourned to 5.10.2004 for final arguments.

A.D.J.”

25. Thereafter, suit was dismissed in default on 26th October, 2004, due to none appearance of the plaintiff. This order reads as under;

“26.10.2004.
Present: Proxy counsel Mr. Anil Kumar for counsel
Shri Deepak Gupta for the defendant no. 1

None appeared for plaintiff since morning despite repeated calls. It is 2.25 P. M.
Suit of the plaintiff is dismissed none appearance.
File be consigned to record room.

A.D.J.”

26. Respondents’ case is that deceased (Sh. G. L. Nanda) was a well known figure and his death was highly publicized in the media. It cannot be said that appellants did not have the knowledge of his death. Since no application for substitution of legal heirs was moved within the prescribed period of limitation, the suit filed by the appellants stood abated.

27. In *Mahabir Prasad (Supra)*, it has been observed;

“Where in a proceeding a party dies and one of the legal representatives is already on the record in another capacity, it is only necessary that he should be described by an appropriate application made in that behalf that he is also on the record, as an heir and legal representative. Even if there are other heirs and legal representatives and no application for impleading them is made within the period of

limitation prescribed by the Limitation Act the proceeding will not abate”.

28. In *Madan Naik (Supra)*, the court observed;

“Order 22, Rule 11 of the Civil P. C. read with O. 22 R. 4 makes it obligatory to seek substitution of the heirs and legal representatives of deceased respondent if the right to sue survives. Such substitution has to be sought within the time prescribed by law of limitation. If no such substitution is sought, the appeal will abate. Sub-rule (2) of R. 9, O.22 enables the party who is under an obligation to seek substitution to apply for an order to set aside the abatement and if it is proved that he was prevented by any sufficient cause from continuing the suit which would include an appeal, the Court shall set aside the abatement. Now where an application for setting aside an abatement is made, but the Court having not been satisfied that the party seeking setting aside of abatement was prevented by sufficient cause from continuing the appeal, the Court may decline to set aside the abatement. Then the net result would be that the appeal would stand disposed of as having abated. It may be mentioned that no specific order for abatement of a proceeding under one or the other provision of O. 22 is envisaged, the abatement takes place on its own force by passage of time. In fact, a specific order is necessary under O. 22 R. 9 CPC for setting aside the abatement.

29. In the present case, there were two defendants and one of the defendant died. Defendant no. 1, who is son of defendant no. 2 (Sh. G. L. Nanda) was already on record. Both defendants were parties to the contract and relief of specific performance had been sought against both of them. Impugned order, in this regard read as under;

“ On perusal of the relevant provisions of Specific Relief Act, specifically section 19 which deals with the question as to against whom the contract specifically enforced, it would be clear that according to the plaintiffs both the defendants were parties to the contract and, therefore, the decree for specific performance had been prayed for against both. Now in the circumstances where Sh. G. L. Nanda, defendant no. 2 has expired and his legal heirs have not been brought on record consequent to which the suit has been abated against him, the cause of action does not survive against the remaining defendants, too. Resultantly, the suit of the plaintiff stands abated.”

30. Though, defendant no. 2 was a well known public figure as he officiated twice as Prime Minister of this Country, but under Order 22 Rule 10 (A) of the Code, it was the duty of counsel for defendant no. 2 (Sh. G. L. Nanda) to have brought to the knowledge of the Court, the fact of his death. Even after his death, defendant no. 2 (Sh. G. L. Nanda) was being represented by his counsel on number of hearings. When a counsel does not have the knowledge about death of his own client i.e. defendant no. 2 (Sh. G. L. Nanda), then how the opposite party i.e. appellants could have got the knowledge with regard to the death of defendant no. 2 (Sh. G. L.Nanda). Counsel for defendant no. 2 remained silent about the death of defendant no. 2 which took place on 15th January, 1998. For the first time, counsel for defendant no. 2 pointed out about death of defendant no. 2 (Sh. G. L. Nanda) to the Court on 20th September, 2004. If knowledge with regard to the death of defendant no. 2 is taken as 20th September, 2004, then application for substitution filed on behalf of appellants is within its time.

31. In *Perumon Bhagvathy Devaswom, Perinadu Village Vs. Bhargavi Amma (Dead) by LRs. And Ors. (2008) 8 SCC 321*, the Court observed;

“ Rule 10 A of Order 22 casts a duty on the counsel for the respondent to inform the court about the death of such respondent whenever he comes to know about it. When the death is reported and recorded in the order sheet/proceedings and the appellant is notified, the appellant has knowledge of the death and there is a duty on the part of the appellant to take steps to bring the legal representative of the deceased on record, in place of deceased. The need for diligence commences from the date of such knowledge”.

32. Since, both defendants were party to the contract and one of the defendant died, the right to sue certainly survive to the surviving defendant. Even in the written arguments filed on behalf of respondent, it is stated that the effect of this abatement is limited to defendant no. 2 (Sh. G. L. Nanda). So far as defendant no. 1 is concerned, the rights to sue survive against him.

33. Thus, as per respondents’ own case, right to sue survive to defendant no. 1. So, there was no cause for abatement of the suit. The impugned order passed by the trial court is contrary to the provisions of Order 22 of the Code, and is therefore set aside.

34. Present appeal filed by appellants is allowed and it is ordered that Smt. Laxmi Nanda, legal heir of defendant no. 2 (Sh. G. L. Nanda) be brought on record, in place of deceased (Sh. G. L. Nanda) and suit shall proceed in accordance with law.

35. Parties shall bear their own costs.
36. Copy of this judgment be sent to the trial court.

CM No. 1368/08

Application also stands disposed of, accordingly.

22nd January, 2010

V.B.Gupta, J.

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