

GAHC010212552022



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THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : I.A.(Civil)/3328/2022

SRI MRIDUL DEKA
S/O LATE MANHARI DEKA
RESIDENT OF VILLAGE BATIKURIHA
MOUZA NAGAON, DISTRICT BARPETA
ASSAM 781301

VERSUS

SMT SUKHILA DEKA AND ANR.
W/O LATE MANHARI DEKA RESIDENT OF VILLAGE BATIKURIHA MOUZA
NAGAON, DISTRICT BARPETA ASSAM 781301 PRESENTLY RESIDING AT
BARPETA MOUZA BARPETA, DISTRICT BARPETA ASSAM 781301

2:SRI MUNINDRA DEKA
W/O LATE MANHARI DEKA RESIDENT OF VILLAGE BATIKURIHA MOUZA
NAGAON
DISTRICT BARPETA ASSAM 781301 PRESENTLY RESIDING AT BARPETA
MOUZA BARPETA
DISTRICT BARPETA ASSAM 78130

Advocate for the Petitioner : MR. S SARMA, MR. J DEKA, MR. T K BHUYAN, MR. S K DEKA
Advocate for the Respondent : MR. B J GHOSH (R-1,2), MR. DILIP DEY (R-1,2)

BEFORE
HONOURABLE MRS. JUSTICE MALASRI NANDI

ORDER

20.12.2024

Heard Mr. J. Deka, learned counsel for the petitioner. Also heard Mr. B.J.

Ghosh, learned counsel for the respondents.

2. By filing this application under Order 22 Rule 9 read with Section 151 of CPC for setting aside abatement of appeal vide order dated 08/01/2021 and praying for exemption to substitute the legal representatives of the proforma respondents no. 9 and 12 respectively.

3. The applicant as appellant preferred the connected Second appeal vide no. RSA No. 194 of 2018 on being highly aggrieved and dissatisfied with the Judgment and Decree dated 30/01/2018 passed by the learned Additional District Judge, Barpeta in title appeal no. 1/ 2017 whereby the learned First Appellate court allowed the appeal thereby reversing the Judgment and Decree dated 23/12/2016 passed by the learned Civil Judge, Barpeta in TS No. 26 of 2011.

4. The appeal vide RSA No. 194 of 2018 was admitted for hearing by this court dated 18/09/2018 by formulating substantial question of law. The opposite parties/ principle respondents' no. 1 and 2 appeared but none of the proforma respondents appeared in the said appeal.

5. This court vide Order dated 08/01/2021 disposed the appeal as abated on the expiry of proforma respondents no. 9 and 12. The applicant filed an application being IA (C) No. 1489 of 2021 for re-admission of the connected second appeal by setting aside the order of abatement dated 08/01/2021. The opposite parties no. 1 and 2 filed affidavit in opposition. As the said application was filed quoting wrong provisions of law, the applicant had to withdraw the said application to file appropriate application. Accordingly, this court vide order dated 23/09/2022 allowed the applicant to withdraw and file an appropriate

application. Hence, this petition.

6. Learned counsel for the petitioner has argued that after admission of the appeal vide order dated 18/09/2018, the earlier engaged counsel informed the applicant regarding the admission of the appeal and it was also informed that the appeal would be heard on merit in due course of time and as such his personal attendance is not required. It was also informed that the outcome of the appeal would be informed to him accordingly.

7. It is further submitted that in the month of April 2021, the applicant made an inquiry to one of the junior counsel of the engaged advocate regarding status of the case. The said counsel informed the applicant that the engaged counsel had been suffering from covid 19 and admitted to the hospital. The said counsel also informed that the second appeal was disposed of vide order dated 08/01/2021.

8. According to learned counsel for the petitioner, the decree was passed by the First Appellate court against the applicant only. In the appeal i.e., RSA No. 194 of 2018, the opposite parties i.e., the principle respondents no. 1 and 2 are alive and contested the appeal. Therefore, the death of the proforma respondents no. 9 and 12 shall not cause the appeal to be abated since the right to sue survives against the surviving respondents. Further, the proforma respondents no. 9 and 12 neither contested the suit nor filed written statement and as such the suit was proceeded ex-parte against them. Under such facts and circumstances, this court ought to have exercised discretionary power of the court to exempt the applicant from the necessity of bringing on record the legal representatives of the aforesaid deceased respondents under Order 22 Rule 4(4) CPC.

9. According to learned counsel for the petitioner, since the appeal has been abated ignoring the provisions of Order 22 Rule 4 of the CPC, this court would be pleased to restore the appeal by setting aside the Order dated 08/01/2021 in the interest of justice. It is also prayed that the applicant may be exempted from the necessity of bringing on record the legal representatives of the deceased respondents' no. 9 and 12.

In support of his submission, learned counsel for the petitioner has placed reliance on the following case laws -

(1)Nepal Chandra Saha vs Rebati Mohan Saha and others reported in (1979) O AIR (Gau) 1.

(2)(2013) 9 SCC 642 (Sushil K. Chakravarty vs Tej Properties Private Limited).

(3)2022 SCC Online SC 855 (Delhi Development Authority vs Diwan Chand Anand and others.

10. In response, learned counsel for the respondent has filed an affidavit in opposition by stating that taking into consideration the consecutive absence of the learned counsel of the applicant and not taking steps for substitution of the deceased respondents no. 9 and 12, the order was passed by this court on 03/01/2020 issuing notice to the appellant and since one month had been elapsed and neither AD card nor unserved notice had been received back, the notice deemed to have been served to the appellant. Subsequently, the appeal was abated and disposed of and this court rightly passed the order dated 08/01/2021. It is further submitted that by the order dated 08/01/2021, the appeal was abated as a whole and therefore, the prayer for exemption to

substitute under Order 22 Rule 4 (4) is not maintainable. According to learned counsel for the respondent, only the review lies against the order dated 08/01/2021.

Learned counsel for the respondent has placed reliance on the following case laws -

(1) State of W. B. vs Manisha Maity and others reported in AIR 1965 Calcutta 459

(2) State of Punjab vs Nathu Ram reported in AIR 1962 SC 89.

11. Having heard the learned counsel for the parties, it is apt to mention the relevant order passed on 08/01/2021 which is reproduced as follows –

“None appears on call for the appellant and Mr. B. J. Ghosh, learned counsel for the respondents No. 1 and 2 is present.

He has referred to the order dated 10/12/2020, wherein it is indicated that the learned counsel for the appellant is absent for the consecutive 5th time. It has also been recorded in the said order that no steps for substitution of the deceased respondents no. 9 and 12 have been taken by the appellant and that by order dated 03/01/2020 an observation was made by this court that failure on part of the appellant to take necessary steps for substitution of the deceased respondents no. 9 and 12, adverse order of dismissal would follow.

It is seen that court had issued notice on the appellant by registered post on 27/11/2020, however, more than one month has passed and neither the AD card nor unserved notice has been received back. Therefore, notice is deemed to be duly served on the appellant.

In that view of the matter, as the respondents no. 9 and 12 have

purportedly expired, this appeal would stand abated and disposed of.

It is needless to mention that on abatement of the appeal, the interim order passed on 18/09/2018 in IA @ 2454/18 has lost its force.”

12. After going through the aforesaid order, it reveals that on 08/01/2021 the appellant was absent before this court. The learned counsel for respondent no. 1 and 2 was present. It is also not in dispute that the respondent no. 9 and 12 expired but no steps was taken by the appellant for substitution of their legal heirs.

13. Order XXII Rule 4 (1) [CPC](#) provides that where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, 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. Sub-rule (3) of the Rule provides that where, within the time limited by law, no application is made under sub-rule (1) the suit shall abate as against the deceased defendant.

14. In the case in hand, as per order dated 08/01/2021, the entire appeal was abated as the legal representatives of proforma respondents no. 9 and 12 were not substituted but the learned counsel for the respondent no. 1 and 2 was present.

Now, the question comes whether the entire appeal be abated against the other defendants who were alive on the date in absence of substitution of legal heirs of other deceased defendants!

15. This question may be examined first on principle. The basic principle underlying order 22, rules 3 and 4 which on account of the provision contained

in order 22, rule 11 apply to appeals, is indisputably a facet of natural justice or a limb of audi altrem partem rule. It is a fundamental rule of natural justice that a man has a right to be heard- audi altrem partem-where a decision affecting him or his interest is to be recorded. It hurts one's sense of justice, fairness and reason that a decision one way or the other is recorded affecting a party without giving that party an opportunity of being heard. This rule embraces the whole notion of fair procedure and the rule requiring a hearing is of almost universal validity. It has made a serious inroad in administrative decisions. It should enjoy a top place in a judicial proceeding.

16. The first limb of this rule audi altrem partem is that a person must be given an opportunity of being heard before a decision one way or the other affecting him is recorded. As a corollary to this rule it is provided in [the Code of Civil Procedure](#) that where a party to the proceeding dies pending the proceeding and the cause of action survives, the legal representatives of the deceased party should be brought on record which only means that such legal representatives must be afforded an opportunity of being heard before any liability is fastened upon them. It may be that the legal representatives in a given situation may be personally liable or the estate of the deceased in their hands would be liable and in either case a decision one way or the other, adverse or favourable to them, cannot be recorded unless they are given an opportunity of being heard. Order 22, rules 3 and 4 codify these procedural safeguards translating into statutory requirement one of the principles of natural justice.

17. If this is the discernible principle underlying order 22, rules 3 and 4 it has been demonstrably established by interpretation put on these two rules. Original

view was that all legal representatives of a deceased plaintiff or defendant must be substituted on the pain of the action abating. With utmost diligence from a multitude some one may escape notice and the consequent hardship in abatement of action led this Court to assert the principle that where some legal representatives are brought on record permitting an inference that the estate is adequately represented, the action would not abate though it would be the duty of the other side to bring those legal representatives on record who are overlooked or missed even at a later date. When the aforementioned two provisions speak of legal representatives, it only means that if after diligent and bona fide enquiry the party liable to bring the legal representatives on record ascertains who are the legal representatives of a deceased party and brings them on record within the time limited by law, there is no abatement of the suit or appeal on the ground that some other legal representatives have not been brought on record, because the impleaded legal representatives sufficiently represent the estate of the deceased and the decision would bind not only those impleaded but the entire estate including the interest of those not brought on record. This view has been consistently adopted by the Hon'ble Apex Court in **(1)[Daya Ram & Ors. v. Shyam Sundari](#) reported in (1964) SCC online SC 153 (2) [N. K. Mohammad Sulaiman v. N. C. Mohammad Ismail & Ors.](#) Reported in (1966) 0 AIR (SC) 792; and (3) [Harihar Prasad Singh & Ors. v. Balmiki Prasad Singh & Ors.](#) reported in (1975) 0 AIR (SC) 733.**

18. The principle deducible from these decisions is that not only the interest of the deceased was adequately taken care of by those who were on record but they had the opportunity to put forth their case within permissible limits. Neither the case of the deceased nor of his successors in-interest has gone by default.

In other words, the principle is that if the deceased had as a party a right to put forth his case, those likely to be affected by the decision on death of the deceased had the same opportunity to put forth their case and even if from a large number having identical interest some are not brought on record, those who are brought on record would adequately take care of their interest and the cause in the absence of some, such would not abate.

19. Another principle in this behalf which has found recognition of the Courts is that if the legal representatives of the deceased party are before the Court in the same action even if in another capacity, failure to bring them on record in a specific legal position would not result in abatement of the action. In **Mahabir Prasad v. Jage Ram & Ors. Reported in (1971) 0 AIR(SC) 742** Hon'ble Apex Court was called upon to consider whether where a legal representative of a deceased party is on record in another capacity, failure to implead him as legal representative of the deceased party would result in abatement of the action?

20. In that case, Mahabir Prasad, his wife Saroj Devi and his mother Gunwanti Devi filed a suit against Jaga Ram and two others for recovering rent then due in the aggregate amount of Rs. 61,750/-. The suit ended in a decree. The execution of the decree was resisted by the defendants on the plea inter alia that the decree was inexecutable because of the provisions of Delhi Land Reforms Act, 1954. This contention found favour with the executing court and the application for execution was dismissed. Mahabir Prasad, one of the decree holders alone appealed against that order and impleaded Gunwati Devi and Saroj Devi as party respondents along with the original judgment- debtors. Saroj Devi died in November 1962 and Mahabir Prasad applied that the name of Saroj Devi be struck off from the array of respondents. The High Court made an order granting the application "subject to all just exceptions". Subsequently, the High

Court dismissed the appeal holding that because the heirs and legal representatives of Saroj Devi were not brought on record within the period of limitation, the appeal abated in its entirety. Hon'ble Supreme Court, while setting aside the order made by the High Court holding that the appeal abated, observed as under:

"Even on the alternative ground that Mahabir Prasad being one of the heirs of Saroj Devi there can be no abatement merely because no formal application for showing Mahabir Prasad as an heir and legal representative of Saroj Devi was made. 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 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".

21. In the case of **Shahazada Bi vs. Halimabi (Since Dead) by her LRs, (2004) 7 SCC 354**, it was held that

"....Order XXII rule 4 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...”

22. In a recent case of **Delhi Development Authority vs. Diwan Chand Anand and others, reported in (2022) SCC Online SC 855**, it was observed as follows -

“...36. Thus, as observed and held by the Court:

(i) The death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives;

(ii) If there are more plaintiffs or defendants than one, and any of them dies, and where the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the Court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants (Order 22 Rule 2);

(iii) 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. Where within the time limited by law no application is made under subrule 1 of Order 22 Rule 4, the suit shall abate as against the deceased defendant;

(iv) The provision of Order 22 shall also apply to the appeal proceedings also.”

9. In our considered view also, where there are more than one plaintiffs, the entire suit cannot be held to be abated on the death of one of the plaintiffs....”

23. Coming to the question of review, the settled proposition of law is that review is permissible on the fact of error apparent on the face of the record.

24. *The scope and ambit of the Court’s power under Order 47 Rule 1 CPC is required to be considered and for that few decisions of Hon’ble Apex Court are*

required to be referred to.

25. In the case of Haridas Das vs. Usha Rani Banik (Smt.) and Others, (2006) 4 SCC 78 while considering the scope and ambit of Section 114 CPC read with Order 47 Rule 1 CPC, it was observed and held as under:

“14. In Meera Bhanja v. Nirmala Kumari Choudhury, (1995) 1 SCC 170 it was held that:

“8. It is well settled that the review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 CPC. In connection with the limitation of the powers of the court under Order 47 Rule 1, while dealing with similar jurisdiction available to the High Court while seeking to review the orders under Article 226 of the Constitution, this Court, in Aribam Tuleshwar Sharma v. Aribam Pishak Sharma, (1979) 4 SCC 389 speaking through Chinnappa Reddy, J. has made the following pertinent observations:

‘It is true there is nothing in Article 226 of the Constitution to preclude the High Court from exercising the power of review which inheres in every court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. But, there are definitive limits to the exercise of the power of review. The power of review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found, it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a court of appeal. A power of review is not to be confused with appellate power which may enable an appellate court to correct all manner of errors committed by the subordinate court.’ ”

26. A perusal of Order 47 Rule 1 shows that review of a judgment or an order could be sought: (a) from the discovery of new and important matters or evidence which after the exercise of due diligence was not within the knowledge of the applicant; (b) such important matter or evidence could not be produced

by the applicant at the time when the decree was passed or order made; and (c) on account of some mistake or error apparent on the face of the record or any other sufficient reason.

27. In *Aribam Tuleshwar Sharma v. Aribam Pishak Sharma*, AIR 1979 SC 1047, Apex Court held that there are definite limits to the exercise of power of review. In that case, an application under Order 47 Rule 1 read with Section 151 of the Code was filed which was allowed and the order passed by the Judicial Commissioner was set aside and the writ petition was dismissed. On an appeal to the Apex Court, it was held as under:

“It is true as observed by this Court in Shivdeo Singh v. State of Punjab, AIR 1963 SC 1909 there is nothing in Article 226 of the Constitution to preclude a High Court from exercising the power of review which inheres in every court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. But, there are definitive limits to the exercise of the power of review. The power of review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a court of appeal. A power of review is not to be confused with appellate powers which may enable an appellate court to correct all manner of errors committed by the subordinate court.”

28. It is also pertinent to mention the observations of the Hon'ble Supreme Court in **Parsion Devi v. Sumitri Devi, (1997) 8 SCC 715**. Relying upon the judgments in *Aribam* and *Meera Bhanja*, it was observed as under:

“9. Under Order 47 Rule 1 CPC a judgment may be open to review inter alia if there is a mistake or an error apparent on the face of the record. An error which is not selfevident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the

record justifying the court to exercise its power of review under Order 47 Rule 1 CPC. In exercise of the jurisdiction under Order 47 Rule 1 CPC it is not permissible for an erroneous decision to be 'reheard and corrected'. A review petition, it must be remembered has a limited purpose and cannot be allowed to be 'an appeal in disguise'."

29. In the case of ***Lily Thomas vs. Union of India, (2000) 6 SC 224***, it is observed and held that:

"the power of review can be exercised for correction of a mistake but not to substitute a view. Such powers can be exercised within the limits of the statute dealing with the exercise of power."

30. The grounds on which review can be sought are enumerated in Order 47 Rule 1 CPC, which reads as under:

"1. Application for review of judgment.—(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment of the court which passed the decree or made the order. "

31. An application for review would lie inter alia when the order suffers from an error apparent on the face of the record and permitting the same to continue would lead to failure of justice. In *Rajendra Kumar & others v. Rambhai & ors* reported in (2002) 0 Supreme (Raj) 560 the Hon'ble Supreme Court has held as follows:-

“The limitations on exercise of the power of review are well settled. The first and foremost requirement of entertaining a review petition is that the order, review of which is sought, suffers from any error apparent on the face of the record and permitting the order to stand will lead to failure of justice. In the absence of any such error, finality attached to the judgment/order cannot be disturbed.”

32. The power of review can also be exercised by the court in the event of discovery of new and important matter or evidence takes place which despite exercise of due diligence was not within the knowledge of the applicant or could not be produced by him at the time when the order was made. An application for review would also lie if the order has been passed on account of some mistake. Furthermore, an application for review shall also lie for any other sufficient reason.

33. It is beyond any doubt or dispute that the review court does not sit in appeal over its own order. A rehearing of the matter is impermissible in law. It constitutes an exception to the general rule that once a judgment is signed or pronounced, it should not be altered. It is also trite that exercise of inherent jurisdiction is not invoked for reviewing any order.

34. In view of the aforesaid legal proposition, it can be said that review is permissible only to rectify the error apparent on the face of the record. An error which is not self evident and has to be detected by a process of reasoning can hardly be said to be an error apparent on the face of the record justifying the court to exercise its power of review under Order 47 Rule 1 CPC. In exercise of the jurisdiction under Order 47 Rule 1 CPC it is not permissible for an erroneous decision to be reheard and corrected. A review petition, it must be remembered has a limited purpose and cannot be allowed to be an appeal in disguise.

35. In view of the above discussion, this court is of the opinion that the

review does not lie against the order dated 08.01.2021. Hence, the prayer of the petitioner for restoration of the appeal deserves to be allowed. Therefore, the RSA No. 194/2018 is restored to file.

36. The civil revision is disposed of accordingly.

JUDGE

Comparing Assistant