

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

C.R. No. 3575 of 2013 (O & M)

Reserved on: 05.01.2015

Date of decision: 21.01.2015

Surinderjit Kaur

....Petitioner(s)

Versus

Sukhdev Singh

...Respondent(s)

CORAM: HON'BLE MR. JUSTICE G.S.SANDHAWALIA

Present: Mr. Sudhir Mittal, Advocate,
for the petitioner.

Mr. Jagdish Manchanda, Advocate,
for the respondent.

G.S.SANDHAWALIA, J.

The present revision petition has been filed by defendant no. 2 under Article 227 of the Constitution of India challenging the order passed by the Court of Additional Civil Judge (Sr. Divn.), Pehowa dated 13.05.2013 (Annexure P-7) whereby, the application for dismissal of a suit on account of the fact that defendant no. 1-Jagdish Chand had died much prior to the filing of the suit has been dismissed. Vide the same order, the application filed by the plaintiff-respondent has been allowed and the legal representative of defendant no. 1 namely Rajiv Aggarwal has been directed to be impleaded as a party and the case was fixed for awaiting his presence.

The necessary facts are that the respondent no. 1-plaintiff filed a suit for declaration and relief of possession on 19.02.2008 against the petitioner and one Jagdish Chand who was arrayed as defendant no. 1. The suit was based on the ground that there was no exchange deed with

defendant no. 1 and a decree dated 19.07.1985 passed in Civil Suit No. 863 of 1985 titled as Jagdish Chand vs. Sukhdev Singh was void as he had never appeared in the said suit. The resultant mutation was also challenged and the subsequent transfer of the land in favour of the present petitioner by alleging that the plaintiff was still in cultivating possession.

An application dated 21.03.2011 was filed by the present petitioner on the ground that defendant no. 1-Jagdish Chand had died much prior to the filing of the suit. The death certificate showing the date of death as 26.10.1987 was appended alongwith the affidavit of Rajiv Aggarwal, who was his son. The application was contested by the plaintiff/respondent no. 1 that the Court had passed an order for the presence of the legal heirs of the deceased and that the plaintiff was not aware that the said defendant had died. The revenue record also did not mention this fact and the said defendant had left the village 30 years ago and until his son appears in Court, the fact would remain disputed. Thereafter, an application was filed by respondent no. 1 that the legal representatives of Jagdish Chand may be impleaded as defendants and defendant no. 2 be directed to supply the details of the legal representatives. It was pleaded that the ex parte proceedings had earlier been initiated against the defendants and the present petitioner had filed an application for setting aside the ex parte order dated 30.04.2008 and the said order had been set aside on 04.11.2010. In view of the application having been filed earlier notice had been sent to Rajiv Aggarwal and a report had come that he had left the house which had been mentioned in the affidavit. It was mentioned that in the death certificate, the name had been mentioned as J.C. Aggarwal and the complete name had not been mentioned and there was a doubt about his death. The son was not

appearing and accordingly, it was pleaded that the legal representatives be impleaded as defendants and proceedings be initiated against them to supply the details.

As noticed, the application filed by the petitioner has been dismissed whereas the application filed by respondent no. 1-plaintiff has been allowed by noticing that the plaintiff might not have knowledge of the factum of the death of defendant no. 1 and, therefore, failure to implead the legal representatives is a bona fide mistake. Reliance has been placed upon the judgment of the Apex Court in ***Karuppaswamy vs. C. Ramamurthy, AIR 1993 SC 2324***. It was further noticed that the son of the deceased was in the knowledge of the case and he was not appearing before the Court and was watching the proceedings through the present petitioner and accordingly, a direction was issued for him to put in appearance, failing which, ex parte proceedings would be initiated against him.

Counsel has accordingly submitted that the suit could not have been filed against a dead person and sought to distinguish the judgment of the Apex Court in *Karuppaswamy's case (supra)* and placed reliance upon the judgment of this Court in ***Karam Kaur vs. Dalip Singh (D) through L.Rs. and another, 2001 (2) CCC 9*** to contend that a suit could not be filed against a dead person and it was a nullity and the legal representatives could not be brought on record.

A perusal of the said judgment would go on to show that this Court allowed the plaintiff to move an application for withdrawal of the suit with permission to file a fresh suit regarding the same subject matter in view of the death of one of the defendants before the filing of the suit. Reliance was placed upon ***Cuttack Municipality vs. Shyamsunder Behera, AIR***

1977 (Orissa) 137 to hold that the suit filed against a dead person was a nullity and no substitution could be made. It is, however, pertinent to notice that the Apex Court in *Karuppaswamy's case (supra)* did not approve the decision in *Cuttack Municipality's case (supra)*. The Apex Court, keeping in view the provisions of Section 21 of the Limitation Act, 1963, held that the view taken by the Orissa High Court that the suit was a nullity was not correct. The civil appeal filed by the defendant challenging the order of the Single Judge of the Madras High Court which had allowed the revision petition of the plaintiff and directed that the legal representatives of the defendant who had died prior to the institution of the suit could be substituted and added as a party to the suit was dismissed. The relevant observations in *Karuppaswamy's case (supra)* read thus:-

“3. Learned Counsel for the parties cited before us case law bred in various High Courts of the country on the subject of procedural law under the Civil Procedure Code as to whether a suit filed against a dead person is non-est and whether that dead person impleaded could be substituted by his heirs and legal representatives or be added as parties to the suit. Having heard them and having pondered over the matter, we are of the opinion that those questions do not seriously arise, when we see the sweep of the relevant provision under the Act, governing the subject, unamended and amended. That provision under the Indian Limitation Act, 1908, was Section 22 which read as follows : -

22 (1) Effect of substituting or adding new plaintiff on defendant: Where, after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, a regards

him, be deemed to have been instituted when he was so made a party.

(2) Nothing in Sub-section (1) shall apply to a case where a party is added or substituted owing to an assignment or devolution of any interest during the pendency of a suit or where a plaintiff is made a defendant or a defendant is made a plaintiff.

4. Now under the Limitation Act, 1963, it is Section 21 which reads as follows :

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.

(2) Nothing in Sub-section (1) shall apply to a case where a party is added or substituted owing to assignment or devolution of any interest during the pendency of a suit or where a plaintiff is made a defendant or a defendant is made a plaintiff.

5. A comparative reading of the proviso to Sub-section (1) shows that its addition has made all the difference. It is also clear that the proviso has appeared to permit correction of errors which have been committed due to a mistake made in good faith but only when the court permits correction of such mistake. In that event its effect is not to begin from the date on which the application for the purpose was made, or from the date of permission but from the date of the

suit, deeming it to have been correctly instituted on an earlier date than the date of making the application. The proviso to Sub-section (1) of Section 21 of the Act is obviously in line with the spirit and thought of some other provisions in Part III of the Act such as Section 14 providing exclusion of time of proceeding bona fide in court without jurisdiction, when computing the period of limitation for any suit, and Section 17(1) providing a different period of limitation starting when discovering - a fraud or mistake instead of the commission of fraud or mistake. While invoking the beneficial proviso to Sub-section (1) of Section 21 of the Act an averment that a mistake was made in good faith by impleading a dead defendant in the suit should be made and the court must on proof be satisfied that the motion to include the right defendant by substitution or addition was just and proper, the mistake having occurred in good faith. The court's satisfaction alone breaths life in the suit.

6. *It is noteworthy that the trial court did not attribute any neglect or contumacy to the conduct of the plaintiff-respondent. It was rather observed that the plaintiff could have known the date of the death of the first defendant only by the counter filed to IA 265/75. Normally, if he had known about the date of death of the defendant, he would have filed the suit in the first instance against his heirs and legal representatives. The trial court has also opined that the plaintiff was ignorant as to such death and that is why he filed IA 265/75 under Order 22 Rule 4 of C.P.C. The High Court too has recorded a finding that there was nothing to show that the plaintiff was aware of the death of the first defendant and yet knowing well about it, he would persist in filing the suit against a dead person. In*

conclusion, the learned Single Judge held that since the plaintiff-respondent had taken prompt action it clearly showed that he had acted in good faith. Thus the High Court made out a case for invoking the proviso to Sub-section (1) of Section 21 of the Act in favour of the plaintiff-respondent. Sequally, the High Court found no difficulty in allowing IA 785/75 permitting change of the provision whereunder IA 265/75 was filed and in allowing IA 265/75 ordering the suit against the heirs and legal representatives of defendant No.1 to be dating back to 14.11.74, the date on which the plaint was originally presented.

7. to 10. xxx xxx xxx

*11. Not fully appreciating the ratio of case in a learned Single Judge of the Orissa High Court in **Cuttack Municipality v. Shyamsunder Behera** , in our view, wrongly termed the suit to be a nullity, when the effect of its being nullified was removable through proviso to Section 21(1) of the Act, **Khaja Begum v. Gulam Mohiuddin and Ors.** is not a case under the proviso to Sub-section (1) of the Section 21 of the Act and thus requires no comment.”*

It was accordingly held that once there is a mistake in good faith, then the suit filed could continue and the legal representatives could be brought on record. A reference can also be made to the observations in ***Dhani vs. Gian Chand and others, 1973 PLJ 451*** wherein, this Court noticed the observations of the Reference Bench in RSA No. 7151 of 1958 wherein, it was held that where there is ignorance of death or on account of fraud practised, then the Court has the ample power under Section 151 CPC to reopen and set aside the decree that had been passed against a dead person. The relevant observations read thus:-

“It is well settled that a Court has inherent jurisdiction to correct its previous illegal order or judgment. Where an order or decree is passed against a dead person, it may either be because of the ignorance of the Court about his death or on account of fraud practised by the opposite party. If it is on account of ignorance, then it is a mistake which the Court ought to rectify ; but if it is because of the fraud, the Court even then has ample power under Section 151, Civil Procedure Code, to prevent the abuse of its process by not permitting the decree or the order to stand, and it will be one of the fittest cases for the exercise of such jurisdiction. There is thus consensus of judicial opinion that an order or decree passed against a dead person can be reopened and set aside by a Court in exercise of its inherent jurisdiction under Section 151, Civil Procedure Code.”

Thus, it is apparent that the power of the Court is there to rescue the persons on account of bona fide mistake and the legal representatives can be brought on record. Admittedly, even as per the judgment relied upon by the petitioner in *Karam Kaur's case (supra)*, this Court had granted permission to file a fresh suit against the legal heirs of the deceased so that the dispute could be effectively resolved. By virtue of the impugned order, the Court has only directed the legal representatives of defendant no. 1-Jagdish Chand to appear in Court and give the details of the legal representatives so that the Court can further proceed with the suit by bringing on record the legal representatives for effective adjudication of the lis.

The Bombay High Court in *Suresh Chand B. Aggarwal vs.*

Mansukhbhai H. Doshi, AIR 1996 Bombay 118 held that where the heirs

of the deceased-tenant had been brought on record and on account of a mistake in filing the suit which was made in good faith against the original defendant, no negligence could be attributed on their part and, therefore, the application for bringing the heirs on record which had been allowed was held to be within jurisdiction.

In the present case also, it is to be noticed that it is the categorical case of the plaintiff that defendant no. 1 had left the village 30 years earlier and the revenue record continued in his name and in such circumstances, it could not be attributed that there was any negligence on their part to file the suit against the deceased person.

In such circumstances, the objection which has been raised to the impugned order cannot be said to be without any jurisdiction or suffering from any such illegality which would warrant interference under Article 227 of the Constitution of India and the present revision petition is accordingly dismissed.

21.01.2015
shivani

(G.S. SANDHAWALIA)
JUDGE

