

\$~3.

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Date of Decision: 21.09.2015**

% **RSA 169/2012**

DIN DAYAL SINCE DECEASED THR LRS Appellant

Through: Ms. Deepali Gupta, Advocate

versus

BHAGWAN DEVI

..... Respondent

Through: Mr. T.R. Sharma, Advocate

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

VIPIN SANGHI, J. (OPEN COURT)

1. The present second appeal is directed against the judgment and decree dated 30.03.2012 passed by the First Appellate Court, namely, SCJ-cum-RC (Central), Delhi in RCA No.265/2000 preferred by the original plaintiff Smt. Bhagwan Devi against the original defendant Din Dayal, who is now represented by the legal representatives, the present appellants. By the impugned judgment and decree, the First Appellate Court allowed the first appeal preferred by Smt. Bhagwan Devi to assail the judgment and decree dated 19.05.2000 passed in Suit No.89/1993, whereby the suit of Smt. Bhagwan Devi to seek possession of the suit property was dismissed.

2. The original plaintiff Smt. Bhagwan Devi filed the suit for possession against the original defendant Din Dayal on the premise that she is the owner of the suit property bearing No.D-2273, Lalita Block, Shastri Nagar, Delhi. The plaintiff claimed that she had purchased the suit property by a

registered sale deed, duly registered in the office of the sub-registrar, which was also assessed of house tax, and had an electricity connection in the name of the plaintiff. The defendant Din Dayal was the son of the plaintiff and was in use and occupation of one room and gallery on the first floor shown in red colour in the site plan filed with the suit. The plaintiff stated that the defendant was not taking care of the plaintiff by providing any maintenance. He had been asked to vacate the suit property, but he failed to do so.

3. The plaintiff alleged that the defendant was misbehaving with her, disobeyed her, and acted with cruelty towards her. She also claimed that she gave a public notice disowning the defendant and also served a notice dated 15.05.1983 calling upon the defendant to vacate the premises and also to pay mesne profits. Since the defendant did not vacate the suit premises, she preferred a civil suit being Suit No.26/1989. In that suit, several issues were framed with regard to co-ownership of the suit premises by the defendant; the valuation of the suit for purposes of court fee/jurisdiction; whether the defendant is in unauthorised occupation of one room of the suit premises, and; whether the plaintiff is entitled to the relief claimed.

4. The Trial Court tried issue no.2 with regard to the valuation of the suit property for purposes of court fee and jurisdiction, as a preliminary issue and dismissed the suit, instead of rejecting or returning the suit for making up the deficiency in court fee. Thereafter, the plaintiff Smt. Bhagwan Devi preferred the present suit, i.e. Suit No.89/1993 on the same cause of action after valuing the suit property between Rs.70,000 – 80,000, and paying the requisite court fee on valuation of Rs.75,000/-.

5. The defendant contested the suit on merits as well as by claiming that the suit was barred by res judicata on account of dismissal of Suit No.26/1989. The following issues were framed in the suit:

1. Whether the suit has not been properly valued for the purpose of jurisdiction? OPD
2. Whether the suit of the plaintiff is barred by res judicata? OPD
3. Whether the suit of the plaintiff is time barred? OPD
4. Whether the plaintiff is the sole owner of the property in dispute as claimed in the plaint? OPP
5. Whether the plaintiff is entitled to relief of possession as claimed? OPP
6. Relief?

6. The Trial Court decided issue nos.2 and 3, namely, whether the suit is barred by res judicata and whether the same is barred by time together, and held that the suit was barred by res judicata. It was also held that the suit was barred by time on the premise that the notice dated 15.05.1987 was valid only in respect of the previous Suit No.26/1989, and that the same was not valid for the present Suit No.89/1993. The substantive issues on merits i.e. issue nos.4 and 5 were not decided in view of the decision against the plaintiff nos.2 and 3. Consequently, the suit of the plaintiff was dismissed.

7. The plaintiff then preferred the first appeal being RCA No.265/2000. The First Appellate Court held that the suit was not barred by res judicata, since the earlier suit had been dismissed only on the ground that the said suit had not been correctly valued and court fee affixed, and no decision had been rendered on merits. Reliance was placed on the judgment of the

Supreme Court in *Inacoi Martins v. Narayan Hari Naik*, AIR 1993 SC 1756 in this regard.

8. A perusal of the Trial Court record which has been summoned, reveals that before the Trial Court, the judgment rendered in the earlier Suit No.26/1989 was not even produced on record by either of the parties. In this background, this Court wonders how the Trial Court could have entertained the submission that the present suit was barred by res judicata. In any event, the suit could not be said to be barred by res judicata, because the earlier suit had been dismissed on account of incorrect valuation of the relief and non payment of the requisite court fee. The substantive issues had not been pronounced upon by the Court.

9. The First Appellate Court also held that looking to the relationship between the parties, the cause of action was a continuing one. In fact, there was no need for issuance of a notice to seek possession from an unauthorised occupant, or even a licensee. Reliance was placed by the First Appellate Court in *M.C. Mohammed v. Smt. Gowramma & Ors.*, AIR 2007 Kar 46, wherein it was held that once a tenancy had been terminated, there was no need of fresh termination, unless there was a fresh relationship created between the parties. In fact, after the decision in *Jeevan Diesels & Electricals Ltd. v. Jasbir Singh Chadha (HUF) & Anr.*, 182 (2011) DLT 402, no such issue could be raised, as the filing of the suit itself is sufficient notice.

10. The First Appellate Court then proceeded to consider the issues on merit. The testimony of the witnesses produced on behalf of the plaintiff

were considered. PW-1 Bharat Bhushan had appeared on behalf of the plaintiff – being another son and special attorney of the plaintiff. He produced the special attorney as Ex. PW-1/1; he led in evidence the original sale deed as Ex. PW-1/2; the house tax receipts as Ex. PW-1/3; the water bill as Ex. PW-1/4; the electricity bills as Ex. PW-1/5; the site plan as Ex. PW-1/6; the legal notice issued to the defendant as Ex. PW-1/7, and; the AD card in respect whereof as Ex. PW-1/8.

11. The First Appellate Court, consequently, by placing reliance on Ex. PW-1/2, i.e. the sale deed in favour of the plaintiff, held that she was the registered owner of the suit property. The defence of the defendant on merits – that he was the co-owner, as the suit property had been purchased by investment of his funds as well was rejected, since the defendant did not lead any evidence in this respect. Consequently, the suit was decreed and the judgment of the Trial Court was set aside.

12. The first submission of Counsel for the appellant is that the plaintiff herself did not appear as a witness, and she led evidence only through two witnesses, namely, Bharat Bhushan as PW-1 and Om Prakash, a property broker, as PW-2. Learned counsel submits that an attorney cannot tender evidence on behalf of the plaintiff, unless he has personal knowledge and information in relation to his deposition. In this regard, reliance is placed on the judgment of the Supreme Court in *Janki Vashdeo Bhojwani & Anr. v. Indus Ind Bank Ltd.*, AIR 2005 SC 439.

13. In the present case, the plaintiff produced one of her sons Bharat Bhushan as PW-1, who tendered the material evidence on behalf of the

plaintiff. Firstly, a perusal of the testimony of PW-1 shows that the relevant part of his testimony only relates to tendering of unimpeached instrument and document, namely, the sale deed in favour of the plaintiff. The original sale deed was tendered and exhibited as Ex. PW-1/2, which is found on the Trial Court record. Even in his written statement, the defendant did not dispute the execution and existence of the sale deed. His only defence was that he is a co-owner having contributed towards the purchase of the suit property in the name of the plaintiff. It is also important to note that in his cross examination, PW-1 was not challenged or questioned about his standing as a witness of the plaintiff on the ground that he had no personal knowledge with regard to the facts deposed by him. It was not put to him that he had no personal knowledge in respect of his deposition made in his examination in chief. In fact, his cross examination proceeds on the basis that the said witness was aware of the facts and circumstances in relation to which he made his deposition. Consequently, in my view, this submission of Counsel for the appellant has no merit, and does not raise a substantial question of law for consideration in the present appeal.

14. The next submission of Counsel for the appellant is that the appellant Bhagwan Devi died during the pendency of the appeal on 16.09.2006. No steps were taken to bring on record the legal representatives within the period of limitation and, consequently, the appeal automatically stood abated upon expiry of 90 days of the death of the appellant. Learned counsel submits that only on 24.01.2007, an application was moved on behalf of Bharat Bhushan to implead himself as a LR of Bhagwan Devi. In this application, the applicant/Bharat Bhushan claimed that he is one of the legal

heirs of the deceased appellant, and that Smt. Bhagwan Devi had sold the suit property to him vide registered sale deed No.8648 in Book No.1 Vol. 1698, registered at page nos.77 to 84 on 07.12.2005 for consideration. In this application, Bharat Bhushan had claimed that since he had purchased the suit property, the rights in the property had devolved upon him by virtue of the sale deed dated 07.12.2005, and he had right to proceed with the appeal. The reason given by him for not moving the application in time was that he intended to substitute himself in place of the appellant Bhagwan Devi, but due to strike of lawyers and subsequent illness of Bhagwan Devi, he could not move the application for substitution. He stated that he became ill in the first week of December 2006. The applicant also stated that he was moving the application as soon as he had recovered from the illness. He also moved an application under section 5 of the Limitation Act to seek condonation of delay, which was caused due to his illness.

15. This application was replied to by the predecessor in interest of the appellant vide reply dated 21.05.2007. Reply was also filed to the application under section 5 of the Limitation Act, above referred to, on the same date.

16. Counsel for the appellant submits that the First Appellate Court allowed these applications on 21.05.2007. The submission is that this order, allowing the said two applications is illegal. Learned counsel submits that the appeal stood abated upon the expiry of period of limitation and all the legal representatives of the deceased/ original plaintiff should have been impleaded, and on the basis of the so-called sale deed executed in favour of Bharat Bhushan, he alone could not have been brought on record as the legal

representative of the deceased Bhagwan Devi. Learned counsel submits that the First Appellate Court has also failed to appreciate that the applicant Bharat Bhushan had not disclosed sufficient cause to explain the delay in moving the application. No separate application was moved to seek the setting aside of the abatement as postulated by law.

17. Counsel for the appellant has placed reliance on ***Madan Naik (D) by LR v. Hansubala Devi & Ors.***, AIR 1983 SC 676, where the Supreme Court observed that where an application for setting aside the abatement is made, and court is not satisfied that the party seeking setting aside of the abatement was prevented by sufficient cause from moving earlier, the court may decline to set aside the abatement. Reliance is also placed on the judgment of the Supreme Court in ***Union of India v. Ram Charan & Ors.***, AIR 1964 SC 214 : 1964 SCR (3) 467, where the Supreme Court held that there was no question of construing the expression “sufficient cause” liberally. The Supreme Court in this decision observed as follows:

“There is no question of construing the expression ‘sufficient cause’ liberally either because the party in default is the Government or because the question arises in connection with the impleading of the legal representatives of the deceased respondent. The provisions of the Code are with a view to advance the cause of justice. Of 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 setting aside of the abatement within time (need not be over-strict in expecting such proof 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".

18. Reliance is also placed on the decision of this Court in I.A. No.8275/2003 & I.A No.8670/2003 in CS (OS) No.675/1999 decided on 23.10.2007, which in turn referred to the judgment of the Supreme Court in ***Dhurandhar Prasad Singh v. Jai Prakash University & Ors.***, (2001) 6 SCC 534. In ***Dhurandhar Prasad Singh*** (supra), in relation to Order 22 Rule 10 CPC, the Supreme Court, inter alia, observed:

*"6. In order to appreciate the points involved, it would be necessary to refer to the provisions of Order 22 of the Code, Rules 3 and 4 whereof prescribe procedure in case of devolution of interest on the death of a party to a suit. Under these Rules, if a party dies and right to sue survives, the Court on an application made in that behalf is required to substitute legal representatives of the deceased party for proceeding with a suit but if such an application is not filed within the time prescribed by law, the suit shall abate so far as the deceased party is concerned. Rule 7 deals with the case of creation of an interest in a husband on marriage and Rule 8 deals with the case of assignment on the insolvency of a plaintiff. **Rule 10 provides for cases of assignment, creation and devolution of interest during the pendency of a suit other than those referred to in the foregoing Rules and is based on the principle that the trial of a suit cannot be brought to an end merely because the interest of a party in the subject matter of suit has devolved upon another during its pendency but such a suit may be continued with the leave of the Court by or against the person***

upon whom such interest has devolved. But, if no such a step is taken, the suit may be continued with the original party and the person upon whom the interest has devolved will be bound by and can have the benefit of the decree, as the case may be, unless it is shown in a properly constituted proceeding that the original party being no longer interested in the proceeding did not vigorously prosecute or colluded with the adversary resulting in decision adverse to the party upon whom interest had devolved. The Legislature while enacting Rules 3, 4 and 10 has made clear-cut distinction. In cases covered by Rules 3 and 4, if right to sue survives and no application for bringing legal representatives of a deceased party is filed within the time prescribed, there is automatic abatement of the suit and procedure has been prescribed for setting aside abatement under Rule 9 on the grounds postulated therein. In cases covered by Rule 10, the Legislature has not prescribed any such procedure in the event of failure to apply for leave of the court to continue the proceeding by or against the person upon whom interest has devolved during the pendency of a suit which shows that the Legislature was conscious of this eventuality and yet has not prescribed that failure would entail dismissal of the suit as it was intended that the proceeding would continue by or against the original party although he ceased to have any interest in the subject of dispute in the event of failure to apply for leave to continue by or against the person upon whom the interest has devolved for bringing him on the record”.

(Emphasis supplied)

19. The submission of Counsel for the appellant is that the order dated 21.05.2007 passed by the First Appellate Court shows that the First Appellate Court allowed Bharat Bhushan to be substituted in place of the deceased appellant Bhagwan Devi as her “assignee”. The submission is that Bharat Bhushan could not be substituted as an assignee, since the appeal

already stood abated, and Order 22 Rule 10 CPC can be invoked only during the pendency of proceedings and not after the same stands abated. It is also submitted that no separate application to seek abatement has been moved.

20. I do not find any merit in the aforesaid submission of the appellants. Order 22 Rule 3, inter alia, provides that upon demise of the sole plaintiff, if the right to sue survives, the Court on an application made to it in that behalf shall cause the legal representatives of the deceased plaintiff to be made a party and shall proceed with the suit. Where no application is made, as aforesaid, within the time limited by law, the suit shall abate so far as the deceased plaintiff is concerned. Order 22 Rule 9, inter alia, provides that where a suit abates or dismissed under the said order, no fresh suit shall be brought on the same cause of action. It further provides that *“The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff **may apply for an order to set aside the abatement or dismissal**; and if it is proved that he was prevented by any sufficient cause from continuing the suit, the court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit”*. [Emphasis supplied]. Rule 9 (3) specifically provides that Section 5 of the Indian Limitation Act shall apply to applications under sub-rule (2).

21. Thus, the right to move the Court for setting aside of an abatement is not restricted only to the legal representative of the deceased plaintiff, but it extends also to the assignee of the deceased plaintiff. This is because despite there being an assignment of his rights in the subject matter of litigation by the plaintiff during the pendency of the proceedings, the

plaintiff has the right to continue to pursue the suit and the assignee may not seek to bring himself on record. However, he will then be bound by the outcome of the litigation [See *Dhurandhar Prasad Singh* (supra)].

22. Order 22 Rule 5 provides that where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court. The proviso to this rule provides that where such a question arises before the appellate court, that court may before determining the question, direct any sub-ordinate court to try the question and return the records together with evidence, if any, recorded at such trial, its findings and reasons therefor, and the appellate court may take the same into consideration in deciding the question.

23. On the plain reading of the aforesaid provisions, it is clear that an application to seek the setting aside of the abatement and for bringing on record the legal representative/assignee does not necessarily have to be moved by all the legal representatives of the deceased plaintiff. The applicant is not obliged to bring on record all the legal representatives of the deceased plaintiff. If there has been an assignment by the plaintiff prior to his demise to one or more of the legal representatives, or to someone who may not even be a natural heir of the deceased plaintiff, it is open to the assignee as well to move the application to seek the setting aside of the abatement and to bring himself on record in place of the deceased plaintiff.

24. A perusal of the application dated 24.01.2007 moved by the respondent Bharat Bhushan shows that he had stated in para 3 of the

application that he is one of the legal heirs of Smt. Bhagwan Devi and that Smt. Bhagwan Devi had sold the suit property to him. He had also provided the details and particulars of the sale deed dated 07.12.2005 executed in his favour by Smt. Bhagwan Devi.

25. In the reply filed to the said application, there was no denial to the factum of execution of the sale deed dated 07.12.2005 in favour of the applicant Bharat Bhushan. The denial was to the right of Smt. Bhagwan Devi to sell the suit property to Sh. Bharat Bhushan, on the premise that the defendant Din Dayal was also a co-owner in the suit property.

26. Since the factum of execution of the sale deed dated 07.12.2005 in favour of Bharat Bhushan was not even in dispute, the occasion for the First Appellate Court to invoke the proviso to Rule 5 of Order 22 did not arise. The explanation furnished by the applicant Bharat Bhushan to seek substitution/impleadment in place of Smt. Bhagwan Devi was considered by the First Appellate Court in the light of the prescriptions produced by the applicant before the Court, which were seen by the Court. The First Appellate Court, consequently, condoned the delay of 38 days in moving the application and substituted Bharat Bhushan in place of the deceased appellant Bhagwan Devi.

27. It is well settled that the mere failure to mention the correct legal provision while invoking the legal remedy by a party, or the mention of a wrong provision of law, is not of any consequence so long as the legal remedy preferred is otherwise maintainable in law. The applicant Bharat Bhushan was indeed entitled to maintain the application to seek the setting

aside of the abatement and to bring himself on record as the legal representative of the deceased Bhagwan Devi. To justify only his substitution, to the exclusion of the other legal heirs of the deceased Bhagwan Devi, he placed reliance on the registered sale deed made by Bhagwan Devi in his favour prior to her death on 07.12.2005. Bhagwan Devi died on 16.09.2006.

28. The submission of counsel for the appellant that the First Appellate Court could not have allowed the application by treating it as one for substitution under Order 22 Rule 10 CPC is neither here nor there. The application was moved by the applicant Bharat Bhushan in dual capacity, i.e. as a legal heir/legal representative and as an assignee and, as noticed above, an application to seek setting aside of the abatement could be moved by the legal representatives of the deceased plaintiff, or even by an assignee.

29. The mere failure to articulate the relief in the application by specifically seeking setting aside of abatement can also not be considered to be fatal, as the applicant Bharat Bhushan had proceeded on the basis that the appeal is pending for final arguments; the appellant Smt. Bhagwan Devi had died in the meantime on 16.09.2006, and; the applicant sought the relief of himself being substituted/impleaded in place of Smt. Bhagwan Devi. Pertinently, when the said application was moved, there was no order existing on record dismissing the appeal as having abated. No doubt, the legal effect of the application not being moved within 90 days of the demise of Smt. Bhagwan Devi was that the appeal automatically stood abated. However, the absence of an order recording the said abatement, when the application dated 24.01.2007 was moved, explains the failure of the

applicant Bharat Bhushan to specifically pray for setting aside of the abatement. As aforesaid, it is the substance of the application which needs to be appreciated rather than the form. The question of Bharat Bhushan seeking substitution in place of Smt. Bhagwan Devi could arise only if the abatement were not aside. Therefore, the relief of setting aside of abatement was implicit in the relief of substitution sought by Bharat Bhushan in place of the deceased Smt. Bhagwan Devi.

30. Turning to the submission that sufficient cause had not been disclosed by the applicant Bharat Bhushan while moving the said application to seek condonation of delay, I find that the First Appellate Court condoned the delay premised upon the medical certificates produced by the applicant Bharat Bhushan with regard to his own illness. The delay was to the extent of 38 days and it certainly could not be said that the same was gross. Upon the demise of the original plaintiff Bhagwan Devi, who was the mother of the applicant Bharat Bhushan, it goes without saying that the applicant would have been busy with the rituals and ceremonies, which need to be performed on the demise of one's mother. Thereafter, the applicant Bharat Bhushan was himself taken ill and the First Appellate Court saw "all prescriptions" produced before the court before allowing the application.

31. In ***Ram Charan*** (supra), while holding that the expression "sufficient cause" need not be liberally construed, the Supreme Court also observed that the Court while considering such an application "*need not be over-strict in expecting such proof 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”.

32. The First Appellate Court has, in its discretion, after examining the cause disclosed by the applicant Bharat Bhushan coupled with the evidence produced by him, namely, his medical certificates – condoned the delay in filing the application to, in effect, seek the setting aside of the abatement and for substitution of the deceased appellant Bhagwan Devi with himself.

33. The appellant has, however, not advanced any submission to say as to how the First Appellate Court erred in exercising its discretion in favour of the respondent/applicant Bharat Bhushan in condoning the delay and bringing him on record as the legal representative of the deceased appellant Bhagwan Devi.

34. The mere use of the expression “*assignee Sh. Bharat Bhushan is substituted in place of deceased appellant Bhagwan Devi*” in the order dated 21.05.2007 is of no significance, since the applicant Bharat Bhushan made the application in dual capacity – as the natural heir of the deceased appellant as well as the assignee of her rights in the suit property.

35. Thus, I am of the view that no substantial question of law arises in the present case. The appeal is, accordingly, dismissed leaving the parties to bear their respective costs.

VIPIN SANGHI, J

SEPTEMBER 21, 2015

sr