

IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH

RSA No.2146 of 1988 (O&M)

Date of Decision:19.07.2018

Rup Ram

...Appellant

Versus

Nand Ram @ Nand Lal (deceased) through LRs

...Respondents

CORAM:- HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr.N.S.Rapri, Advocate for the respondents.

ANIL KSHETARPAL, J.

The plaintiff-appellant is in the regular second appeal against the judgment passed by the first appellate court, dismissing the appeal on the ground that the sole respondent impleaded in the memorandum of appeal had died before the institution of the appeal.

In the present case, late Shri Nand Ram was the only defendant in the case who was represented by a counsel. He died on 21.7.1987 two months before the decision of the case by the trial court. However, it is not clear as to whether the factum of death of late Shri Nand Ram was brought to the notice of the trial court or not.

The plaintiff-appellant filed an appeal impleading late Shri Nand Ram as respondent in the appeal. An application was filed by one legal representative of Nand Ram, pointing out that the appeal was instituted against a dead person and hence nullity. The plaintiff-appellant while filing reply, although denied the assertions made but prayed that in case it is proved that late Shri Nand Ram died, his legal heir may be permitted to be brought on record. However, the first appellate court dismissed the appeal on the ground that since sole respondent had died before institution of the appeal, therefore, appeal is liable to be dismissed.

I have heard the learned counsel for the respondents and gone through the judgments passed by the courts below.

The first appellate court has overlooked the amendment made in Order 22 Rule 42 of the Code of Civil Procedure, 1908 brought in vide notification dated 11.4.1975 as applicable to the States of Punjab, Haryana and Chandigarh. Amendment carried out in the Code of Civil Procedure is extracted as under:-

“Where within the time limited by law no application is made under sub-rule (1) the suit shall not abate as against the deceased defendant and judgment be pronounced notwithstanding the death and shall have the same force and effect as it had been pronounced before the death took place.

(ii) The following shall be inserted as sub-rule (4), (5) and (6) to Rule 4 of Order XXII:

(4) If a decree has been passed against a deceased-defendant a person claiming to be his legal representative may apply for setting aside the decree qua him and if it is proved that he was not aware of the suit or that he had not intentionally failed to make an application to bring himself on the record, the Court shall set aside the decree upon such terms as to costs or otherwise as it thinks fit.”

(5) Before setting aside the decree under sub-rule (4) the Court must be satisfied prima facie that had the legal representative been on the record a different result might have been reached in the suit.”

(6) The provisions of Section 5 of the Indian Limitation Act (36 of 1963) shall apply to applications under sub-rule (4)”

It is clear from the reading of the sub rule (3) which has been amended that the suit does not abate against the deceased defendant even if no application is made under sub rule (2) and decree passed against the deceased-defendant would be deemed to have been passed before he died.

Still further as per the Punjab and Haryana High Court Rules and Orders Vol.5, Chapter 1 Part-C Rule 4, memorandum of appeal can be amended once it comes to the notice of the party that one of the respondents has died before filing of the appeal. Of course, this rule deals with the appeal to be presented before the High Court, however, rule was enacted to avoid dismissals of the appeals on technical grounds and grant an opportunity to the appellant to move an application for bringing on record legal heirs of the respondent who has died before filing of the appeal. Rule 4 of Punjab and Haryana High Court Rules and Orders Vol.5, Chapter 1 Part-C is extracted as under :-

“4. Amendment of memo of appeal when a deceased made a party in ignorance of death.-Whenever after a memorandum of appeal has been presented to the High Court, any appellant or any party interested in the maintenance of any objection filed in the appeal under Order XLI, Rule 22 or 26 of the Code of Civil Procedure first ascertains that a person, whose name appears in the memorandum of appeal as that of a party to the appeal, and who, if alive, would be a necessary party to such appeal or objection, had died before the memorandum of appeal was presented to the High Court or admitted, such appellant or party so interested as aforesaid may, but subject to the law of limitation, apply for an order that the memorandum of appeal be amended by substituting for the person, who has so died as aforesaid, his legal representative, if at the time when he presents such application, he along with such application, except as hereinafter provided, presents for filing an affidavit showing that such application is made with all reasonable diligence after the fact of the death of such person first came to the knowledge of such applicant or the agent, if any, acting on his behalf in the litigation; provided that a Judge of the High Court may, by an order, allow in his discretion a reasonable

time in that behalf for the presentation of such affidavit, if it appears to him that the applicant could not by the exercise of due diligence have procured such affidavit in time for presentation along with the application.”

In view of the aforesaid discussion, the order passed by the first appellate court is clearly erroneous. The first appellate court ought to have given opportunity to the plaintiff-appellant to move an application for bringing on record the legal heirs as has been prayed for while filing reply to the application for dismissal of the appeal.

In view of the above, the judgment and decree passed by the first appellate court is set aside. The appeal is allowed. The case is remitted to the first appellate court to permit the appellant to implead legal heir(s) of deceased-defendant and thereafter decide the case on merits. Pending application, if any, shall also stand disposed of.

19.07.2018
mks

(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned: Yes/No

Whether Reportable: Yes/No