

Rangubai Kom Shankar Jagtap

Vs

Sunderabai Bhratar Sakharam Jedhe and Others

Civil Miscellaneous Petition Nos. 2402 of 1964, Applications for Substitution for Condonation of Delay and Civil Appeal No. 430 of 1963

(K. Subha Rao, R. S. Bachawat, J. C. Shah JJ)

01.03.1965

ORDER

SUBBA RAO, J.-

These are two applications, one for the substitution of the legal representatives of respondent No. 7 in Civil Appeal No. 430 of 1963 on the file of this Court and the other for the condonation of delay in filing the first application.

The first question is whether there is sufficient ground for excusing the delay in filing the application for bringing the legal representatives of the 7th respondent on record. The facts are as follows : Sakharam Maruti Jedhe and others filed Special Suit No. 10 of 1964 in the Court of the Civil Judge, Senior Division, Poona, against Rangubai Kom Shanker Jagtap for possession of the plaint-schedule property and for mesne profits and obtained a decree therein. Against the said decree defendant preferred an appeal to the High Court of Bombay. The High Court by its judgment dated April 8, 1959, dismissed the appeal. The defendant filed an application for special leave to prefer an appeal to this Court and the same was granted on June 16, 1959. The appeal was admitted on July 27, 1961. Between these two dates, on November 12, 1959, the 7th respondent, Keshavarao Marutirao Jedhe died. Thereafter, on March 7, 1964, the defendant filed Civil Application No. 1118 of 1964 in the High Court of Bombay for bringing on record the legal representatives of the 7th respondent and for necessary certificate to that effect. On August 11, 1964, a Division Bench of the High Court granted the certificate. On February 19, 1964, the defendant filed in this Court Civil Miscellaneous Petition No. 2401 of 1964 for bringing on record the legal representatives of the 7th respondent and on October 8, 1964, filed Civil Miscellaneous Petition No. 2402 of 1964 for condoning the delay of 4 years and 19 days in filing the aforesaid first petition. In the said petition the petitioner gave two reasons for condoning the delay, namely, (i) the petitioner is a poor widow living in Poona with her daughters and there is no male member in the family of the petitioner to look after the proceedings, and (ii) after the preliminary decree in the proceedings for the determination of the mesne profits, the plaintiffs brought the heirs and legal representatives of the deceased 7th respondent on record within the time prescribed and as the legal representatives were brought on record at one stage of the suit, no question of abatement would arise in respect of the appeal. The respondent filed a counter-affidavit pointing out that there were no grounds for excusing the inordinate delay, that the appellant had been conducting this long drawn litigation from the year 1946, that she had a son-in-law who was helping her, that the deceased was a prominent man of Poona whose death was published in all the newspapers and that the appellant was living in the same locality and she must have had knowledge of his death soon after it occurred. It was further pleaded that the fact that the legal representatives of the 7th respondent were brought on

record in the final decree proceedings could not in law prevent the abatement of the appeal, if they were not brought on record in the appeal in time.

Under O. XVI, r. 14, of the Supreme Court Rules, 1950, an application to bring on record the legal representatives of a deceased appellant or respondent shall be made within 90 days of the death of the said appellant or respondent. Under the proviso thereto, in computing the said period the time taken in obtaining a certificate from the High Court shall be excluded. Even if the said time is excluded, there will be a delay of about 3 1/2 years in filing the application to bring the legal representatives of the deceased 7th respondent on record. From the counter-affidavit filed by the respondents it is clear that the 7th respondent was a prominent citizen of Poona and the fact of his death was published in all newspapers; and the petitioner resides very near the place where the 7th respondent was living. She has been conducting this litigation from the year 1946 and was in contact with her Advocates from time to time in connection with the appeal. She has also a son-in-law who is helping her in the litigation. She had also the knowledge of the fact that the legal representatives of the 7th respondent were brought on record in the final decree proceedings. In the circumstances the fact that she is an illiterate woman cannot possibly be a ground for excusing this inordinate delay in bringing the legal representatives of the 7th respondent on record in the appeal. We, therefore, hold that there is no sufficient ground for excusing the delay in bringing the legal representatives of the 7th respondent on record.

The next question raised is an interesting one of law. From the aforesaid narration of facts it will be seen that the legal representatives of the 7th respondent were brought on record within the prescribed time in the final decree proceedings. The question is whether it would enure for the benefit of the appeal; that is to say whether by reason of that fact there is no abatement of the appeal.

The relevant provisions of the Supreme Court Rules, 1950, reads thus : We have already given the gist of O. XVI, r. 14 of the said Rules. Rule 14-A thereof reads :

"The provisions of Order XXII of the Code relating to abatement and of Article 171 in the First Schedule to the Indian Limitation Act, 1908 (IX of 1908), shall, so far as may be applicable, apply to appeals and proceedings under rule 12 and rule 13 in the High Court and in the Supreme Court."

Rule 14-A by reference incorporates the rules of abatement in the Code of Civil Procedure and also Art. 171 in the First Schedule to the Indian Limitation Act in the Supreme Court Rules. Under O. XXII, rr. 3 and 4 of the Code of Civil Procedure, if the plaintiff or the defendant dies and the right to sue does not survive to the surviving plaintiff or against the surviving defendant, as the case may be, his legal representatives shall be brought on record within the prescribed time; and where within the time limited by law no application is made the suit shall abate so far as the deceased plaintiff is concerned or against the deceased defendant, as the case may be. Under r. 11 thereof, "in the application of this Order to appeals, so far as may be, the word "plaintiff" shall be held to include the appellant, the word "defendant" a respondent, and the word "suit" an "appeal". The result is that for the purpose of abatement a suit and an appeal are treated as different proceedings and the suit or the appeal, as the case may be, abates if the legal representatives of the deceased plaintiff or defendant are not brought on record within the time prescribed. Under Art. 171 of the First Schedule to the Limitation Act, an application to set aside an order of abatement shall be made within 60 days from the date of abatement. The result of these provisions is that if an application to bring on record the legal representatives of a respondent is not made within 90 days from the date of

death of the said respondent, the appeal abates; but an application to set aside that abatement can be made within 60 days from the date of abatement.

But, if by reason of the fact that the legal representatives of the deceased 7th respondent were brought on record in the final decree proceedings, there was no abatement, this Court no doubt will exercise its discretion liberally in condoning the delay in not formally getting the legal representatives of a deceased party recorded in appeal in time.

The main contention therefore, is that by reason of the fact that they were brought on record in the final decree proceedings, there was no abatement of the appeal.

It is said that the final decree proceeding is a stage in the suit and the appeal is another stage in the suit and, therefore, the bringing on record of the legal representatives in one stage of the suit will enure for all stages of the suit including the appeal. This conclusion, the argument proceeds, flows from the reasoning of the judgment of the Judicial Committee in *Brij Inder Singh v. Kanshi Ram* [[1917] L.R. 44 I.A. 218, 228]. The relevant facts of that case were these : Pending a suit an application was made for directing a party to produce certain books and that was ordered by the District Judge. Thereafter an application was made to the Chief Court to revise the order of the District Judge. Pending the revision the plaintiff and the 2nd defendant died. Within the prescribed time their legal representatives were brought on record in the revision. Subsequently that revision was dismissed as withdrawn. The legal representatives of the plaintiff and the 2nd defendant were not brought on record in the suit within the time prescribed. The question was whether the suit had abated. The Judicial Committee held that the suit did not abate and the following reasons were given for that view :

"The plaintiff as representative of the original plaintiff, and the defendant's representatives of Joti Lal, had been introduced in the Chief Court. No doubt that was only done in the course of an interlocutory application as to the production of books. But the introduction of a plaintiff or a defendant for one stage of a suit is an introduction for all stages, and the prayer, which seems to have been made *ab majorem cautelam*, by the plaintiff, in his application to the District Judge Prenter under s. 365, was superfluous and of no effect. Coates, the judgment debtor, was only formally called, and the non-presence of his representatives would afford no ground for the abatement of the suit."

This judgment is an authority for the position that if the legal representatives of a deceased plaintiff or defendant are brought on record in an appeal or revision from an order made in the suit, that would enure for all subsequent stages of the suit. The same principle was sought to be extended in a Madras decision to a cross appeal : see *Shankaranaraina Saralaya v. Laxmi Hengsu* [A.I.R. 1931 Mad. 277, 278]. There, two appeals were independently filed against the decree in a suit - one was filed by the plaintiff and the other by the defendant. The plaintiff-appellant died and in the appeal filed by him his legal representatives were brought on record in time, whereas it was not so done in the appeal filed by the defendant-respondent. It was argued that by reason of the fact that the legal representatives of the plaintiff were brought on record in the appeal filed by him there was no abatement in the appeal filed by the defendant. The Court negatived the contention and when the aforesaid decision of the Privy Council was cited, it was distinguished on the following grounds :

"Their Lordships have held that the introduction of a plaintiff or a defendant for one stage of a suit is an introduction for all stages. When the subject-matter of the

interlocutory application was pending in the appellate Court it was deemed to be one stage of the suit and therefore there was no need to put in a fresh application at a further stage of the suit when it came on for trial before the first Court. Can it be said in the present case that what was done in one appeal could enure for the benefit of another appeal unless the latter appeal can be deemed to be a continuation or a further stage of the appeal in which the legal representatives were brought on record? I am constrained to say that it is difficult to extend the principle of the decision of the Privy Council to the facts of this case."

This decision accepts the principle laid down by the Privy Council but distinguishes the case before it on the ground that the interlocutory appeal is not a continuation or a further stage of the appeal in which the legal representatives were brought on record. Many other decisions were cited at the Bar, but they only support the position that in bringing the legal representatives of a deceased party on record in one appeal will not enure for the benefit of a cross appeal.

Let us now consider the question on principle. A combined reading of Order XXII, rr. 3, 4 and 11, of the Code of Civil Procedure shows that the doctrine of abatement applies equally to a suit as well as to an appeal. In the application of the said rr. 3 and 4 to an appeal, instead of "plaintiff" and "defendant", "appellant" and "respondent" have to be read in those rules. Prima facie, therefore, if a respondent dies and his legal representatives are not brought on record within the prescribed time, the appeal abates as against the respondent under r. 4, read with r. 11, of O. XXII of the Code of Civil Procedure. But there is another principle recognized by the Judicial Committee in the aforesaid decision which softens the rigour of this rule. The said principle is that if the legal representatives are brought on record within the prescribed time at one stage of the suit, it will enure for the benefit of all the subsequent stages of the suit. The application of this principle to different situations will help to answer the problem presented in the present case. (1) A filed a suit against B for the recovery of possession and mesne profits. After the issues were framed, B died. At the stage of an interlocutory application for production of documents, the legal representatives of B were brought on record within the time prescribed. The order bringing them on record would enure for the benefit of the entire suit. (2) The suit was decreed and an appeal was filed in the High Court and was pending therein. The defendant died and his legal representatives were brought on record. The suit was subsequently remanded to the trial Court. The order bringing the legal representatives on record in the appeal would enure for the further stages of the suit. (3) An appeal was filed against an interlocutory order made in a suit. Pending the appeal the defendant died and his legal representatives were brought on record. The appeal was dismissed. The appeal being a continuation or a stage of the suit, the order bringing the legal representatives on record would enure for the subsequent stages of the suit. This would be so whether in the appeal the trial Court's order was confirmed, modified or reversed. In the above 3 illustrations one fact is common, namely, the order bringing on record the legal representatives was made at one stage of the suit, be it in the suit or in an appeal against the interlocutory order or final order made in the suit, for an appeal is only a continuation of the suit. Whether the appellant order confirms that of the first Court, modifies or reverses it, it replaces or substitutes the order appealed against. It takes its place in the suit and becomes a part of it. It is as if the suit was brought to the appellate Court at one stage and the orders made therein were made in the suit itself. Therefore, that order enures for the subsequent stages of the suit.

But the same legal position cannot be invoked in the reverse or converse situation. A suit is not a continuation of an appeal. An order made in a suit subsequent to the filing of an appeal at an earlier stage will move forward with the subsequent stages of the suit or appeals taken therefrom; but it

cannot be projected backwards into the appeal that has already been filed. It cannot possibly become an order in the appeal. Therefore, the order bringing the legal representatives of the 7th respondent on record in the final decree proceedings cannot enure for the benefit of the appeal filed against the preliminary decree. We, therefore, hold that the appeal abated so far as the 7th respondent was concerned.

In the result, the petitions are dismissed.

Petitions dismissed.

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