Gangadhar and Another

Vs

Raj Kumar

Civil Appeal No. 6731 of 1983

(D. A. Desai, Ranganath Misra JJ)

26.08.1983

ORDER

1. Special leave granted.

2. One Shrikrishan son of Surajmal Vaisya was the sole respondent in Civil Second Appeal No. 256 of 1976 on the file of the High Court of Madhya Pradesh, Jabalpur, Gwalior Bench. The sole respondent died on April 19, 1980. Surprisingly, Raj Kumar, who is the present respondent, himself applied by IA No. 1980 of 1981 stating that he may be impleaded as an heir and legal representative of the deceased respondent, he being the adopted son of the deceased respondent or in the alternative he is the sole legatee under the last will and testament of the deceased. This application was made to the Court on July 1, 1981. Immediately thereafter on July 15, 1981 IA No. 2110 of 1981 was moved on behalf of the appellants for substitution. It was averred therein that the appellants came to know about the death of the respondent only when the so-called adopted son of the sole respondent moved an application No. 1980 of 1981 on July 1, 1981 stating that the respondent has died on July 1, 1981. Thereafter they made inquiries about the heirs and legal representatives of the deceased respondent and learnt that he died without leaving behind him any heir and his property has escheated to the State of Madhya Pradesh. Approaching the matter from this angle, the appellants sought permission to substitute State of Madhya Pradesh as the successor to the property of the deceased respondent. It was submitted that the appellants did not know about the death of the deceased and they were prevented by sufficient cause from moving the application for substitution in time and therefore delay may be condoned, abatement may be set aside and substitution be granted. The High Court held after taking into consideration the evidence produced by Raj Kumar, who sought substitution himself, that he was the heir and legal representative of the deceased respondent. The High Court however, proceeded to examine that as the application for substitution was filed by the appellants 90 days after the death of the deceased respondent and as the appeal has abated, whether the appellants had made out sufficient cause for condoning the delay in moving the application for substitution.

3. Now the fact remains that admittedly the appellants claim that they came to know about the death of the deceased respondent when the present respondent moved an application for substitution. Rule 10-A which has been added in Order XXII of the Code of Civil Procedure by the Amending Act of 1976 provides that when a pleader appearing for a party to the suit comes to know of the death of the party, he shall inform the court about it and the court thereafter shall issue notice to the other party. In the case of an appeal, the word 'suit' has to be read as 'appeal'. This provision was introduced specifically to mitigate the hardship arising from the fact that the party to an appeal may not come to know about the death of the other party during the pendency of the appeal but when it is awaiting its turn for being heard. The appeal lies dormant for years on end and one cannot expect

the other party to be a watch-dog for day-to-day survival of the other party. When the appeal on being notified for hearing is activated, knowledge occasionally dawns that one or the other party has not only died, but the time for substitution has run out and the appeal has abated. In order to see that administration of justice is not thwarted by such technical procedural lapse, this very innovative provision has been introduced, whereby, a duty is cast upon the learned advocate appearing for the party who comes to know about the death of the party to intimate to the court about the death of the party represented by the learned counsel and for this purpose a deeming fiction is introduced that the contract between dead client and lawyer subsists to the limited extent after the death of the client.

4. Reverting to the facts of this case, present respondent claiming to be the heir and legal representative of the sole respondent in appeal who had died, sought substitution. He did not seriously dispute that abatement be set aside. Undoubtedly, appellants took an unjust stand and challenged his credentials for being substituted in place of deceased respondent. But once the High Court was satisfied that Raj Kumar was the heir and legal representative of deceased respondent, the obvious thing to do was to set aside abatement, grant substitution and dispose of the appeal on merits. Instead of the simple judicial approach, the High Court proceeded to examine whether appellants had made out a sufficient cause which prevented them from seeking the substitution within the prescribed period of limitation and reached an unsustainable conclusion, to be presently pointed out, that no case is made out for condoning the delay.

5. So to the factual matrix, deceased respondent died on April 19, 1980. Appellants' application for substitution was moved on July 15, 1981. Unquestionably it was beyond the prescribed period of limitation and the appeal had abated. What are the intervening circumstances that may help in determining the question whether appellants were prevented by a sufficient cause in moving the application within the period of limitation. Appellants say that when Raj Kumar moved IA No. 1980 of 1981 for substitution on July 1, 1981, they for the first time came to know that the sole respondent had died on April 19, 1980. The High Court proceeded to examine the truth of their averment and held that at least one of the appellants must have come to know that the sole respondent had died on April 19, 1980. The High Court then referred to Union of India v. Ram Charan ((1964) 3 SCR 467 : AIR 1964 SC 215) and held that it is for the appellant to show when he came to know about the death of the deceased respondent, and assign reasons why they did not come to know about it earlier and satisfy the court that they had no means of knowledge and only then the appellants can get benefit of the provision of Clause 5 of the Limitation Act. In approaching the matter from that angle the learned Judge failed to take note of an important change in law deliberately made to cater to situation which was in the hand of the learned Judge. Nowhere in the order the learned Judge refers to Rule 10-A of Order XXII. No attempt was made to appreciate what necessitated the introduction of this new pervasion. Applying the well known test when a new provision in introduced in a statute prescribing procedure as to what was the mischief to remedy which the new provision was introduced in law, Rule 10-A was specifically introduced to meet with the situation in hand.

6. Sole respondent died on April 19, 1980. His adopted son applied for substitution which included intimation to the court of the death of the respondent as envisaged by Rule 10-A on July 1, 1981, that is, nearly one year and six weeks after the death of his adoptive father and promptly within two weeks appellants moved IA No. 2110 of 1981. And it is not made clear when notice of IA No. 1980 of 1981 moved by the adopted son was served upon the appellants or their learning advocate. The legislature intention of casting a burden on the learned advocate of a party to give intimation of the death of the party represented by him and for this limited purpose to introduce a deeming fiction of

the contract being kept subsisting between the learned advocate and the deceased party was that the other party may not be taken unawares at the time of hearing of the appeal by springing surprise on it that the respondent is dead and appeal has abated. In order to avoid procedural justice scoring a march over substantial justice Rule 10-A was introduced by the Code of Civil Procedure (Amendment) Act of 1976 which came into force on February 1, 1977. Unfortunately, the learned Judge took no notice of the wholesome provision and fell back on the earlier legal position which automatically stands modified by the new provision and reached an unsustainable conclusion. In fact in a fact situation as the present one, we may preferably refer to Bhagwan Swaroop v. Mool Chand ((1983) 2 SCC 132). The view taken in that case would unquestionably show that the High Court was in error in refusing to set aside abatement. We are of the opinion that the earliest knowledge about the death of the deceased respondent can be attributed to the appellants on July 1, 1981 when Raj Kumar applied for substitution. Promptly within two weeks the application for substitution was made by the appellants. Therefore, it is satisfactorily established that the appellants were prevented by a sufficient cause in making the application for substitution within the prescribed period of limitation and the delay deserves to be condoned.

7. Accordingly, this appeal succeeds and is allowed. The delay in making the IA No. 2110 of 1981 for substitution of heir and legal representative is condoned. Raj Kumar be substituted as heir and legal representative of deceased sole respondent. The abatement of appeal is set aside. The matter is remitted to the High Court and the High Court may dispose of the appeal on merits. There shall be no order as to costs.

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