

Puran Singh and Others

Vs

State of Punjab and Others

Civil Appeal No. 1596 of 1981

(N.P. Singh, K. Venkataswami JJ)

18.01.1996

JUDGEMENT

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N. P. SINGH, J.:-

1. This appeal has been filed against an order dated 16th March, 1981 passed by the High Court dismissing the Appeal filed on behalf of the appellants, and affirming the order of dismissal of the writ petition which had been filed on behalf of Sham Singh, the father of the appellants.
2. Pursuant to a notification issued by the State Government under Section 14 of the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948 a scheme was prepared by the authorities in respect of holdings belonging to Sham Singh, the father of the appellants, Bir Singh, father of Respondent Nos. 2 and 3, Wazir Singh respondent No.4 Om Prakash respondent No.5 and others in village Longowal, Tehsil and District Sangrur. Objections were filed in respect of the said scheme including on behalf of Sham Singh and other against the proposed allotment of land under the scheme. Those objections were rejected by the Consolidation Officer. The appeal filed on behalf of Sham Singh was accepted by the Settlement Officer, whereas the appeals filed on behalf of Bir Singh and others were rejected. Bir Singh filed further appeals against the orders aforesaid before the Assistant Director, Consolidation of Holdings, Rohtak, which were rejected. Thereafter revision applications were filed on behalf of Bir Singh and Wazir Singh which were allowed on 15th October, 1965 by the Additional Director, Consolidation, who ordered the changes in the allotment of land. Sham Singh, the father of the appellants filed the aforesaid Writ Petition (Civil Writ No.931 of 1966) for quashing the order dated 15th October 1965 passed by the Additional Director, Consolidation of Holdings. During the pendency of the said writ petition, Sham Singh died and appellants were substituted in his place. When the writ petition was taken up for hearing by the learned Single Judge on 14th March, 1975 the Counsel appearing for Bir Singh who was respondent No.2 to the said writ petition informed the Court that the said Bir Singh had died on 9th December, 1971 and no application for bringing his legal representative had been made. It was pointed out that the impugned orders in the writ petition are in favour of Bir Singh and as his legal representative had not been substituted, the writ petition ought to be dismissed. The appellants were not in a position to contradict the aforesaid assertion in respect of the death of Bir Singh, respondent No.2 to the said writ petition. As such, the High Court dismissed the writ petition filed saying that as Bir Singh had died on 9th December, 1971, and no application for bringing the legal representative of the deceased had been made, the writ petition was not maintainable in absence of necessary parties. The Letters Patent Appeal filed against the said order was also dismissed saying that as the appellants had not taken any steps to bring the legal representative of aforesaid Bir Singh who was

respondent to the writ petition, the writ petition had abated. In this connection, reliance was placed by the Division Bench, to the Judgment of five Judges bench of the same Court in the case of Teja Singh v. Union Territory of Chandigarh, AIR 1982 Punjab and Har. 169 (FB), where it had been held that Order 22 of the Code of Civil Procedure (hereinafter referred to as the 'Code') was applicable to the proceeding under Article 226 of the Constitution of India, in view of the Writ Rules framed by the said High Court.

3. On behalf of the appellants it was urged that Articles 226 and 227 of the Constitution has vested extra-ordinary power in the High Court, and the procedure thereof cannot be regulated or controlled by the provisions of the Code because the power under Articles 226 and 227 of the Constitution has to be exercised for the ends of justice taking into consideration the facts and circumstances of a particular case. That power cannot be circumscribed by technical procedural rules regarding suit or appeal as provided under the Code.

4. A personal action dies with the death of the person on the maxim "actio personalis moritur cum persona". But this operates only in a limited class of actions ex delicto, such as action for damages for defamation, assault or other personal injuries not causing the death of the party, and in other actions where after the death of the party the granting of the relief would be nugatory, (Girja Nandini v. Bijendra Narain, (1967) 1 SCR 93 : (AIR 1967 SC 1124). But there are other cases where the right to sue survives in spite of the death of the person against whom the proceeding had been initiated and such right continues to exist against the legal representative of the deceased who was a party to the proceeding. Order 22 of the Code deals with this aspect of the matter. Rule 1 and Order 22 says that the death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives. That is why whenever a party to a suit dies, the first question which is to be decided is as to whether the right to sue survives or not. If the right is held to be a personal right which is extinguished with the death of the person concerned and does not devolve on the legal representatives or successors, then it is an end of the suit. Such suit, therefore, cannot be continued. But if the right to sue survives against the legal representative of the original defendant, then procedures have been prescribed in Order 22 to bring the legal representative on record within the time prescribed. In view of Rule 4 of Order 22 where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant dies and the right to sue survives, the Court on an application being made in that behalf, shall cause the legal representatives of the deceased defendant to be made a party and shall proceed with the suit. If within the time prescribed by Article 120 of the Limitation Act, 1963 no application is made under sub-rule (1) of Rule 4, the suit shall abate as against the deceased defendant. This Rule is based not only on the sound principle that a suit cannot proceed against a dead person, but also on the principle of natural justice that if the original defendant is dead, then no decree can be passed against him so as to bind his legal representative without affording an opportunity to them to contest the claim of the plaintiff. Rule 9 of Order 22 of the Code prescribes the procedure for setting aside abatement.

5. The question with which we are concerned is as to whether the aforesaid provisions made under Order 22 of the Code are applicable to proceedings under Articles 226 and 227 of the Constitution. Prior to the introduction of an explanation by Civil Procedure Code (Amendment) Act 1976, Section 141 of the Code was as follows :

"141. Miscellaneous proceedings - The procedure provided in this Code in regard to suits shall be followed as far as it can be made applicable, in all proceedings in any Court of Civil Jurisdiction". The explanation which was added by the aforesaid

Amending Act said:

"Explanation - In this section, the expression "proceedings" includes proceedings under Order IX, but does not include any proceeding under Article 226 of the Constitution".

There was controversy between different Courts as to whether the different provisions of the Code shall be applicable even to writ proceedings under Articles 226 and 227 of the Constitution. Some High Courts held that writ proceedings before the High Court shall be deemed to be proceedings "in any Court of Civil Jurisdiction" within the meaning of Section 141 of the Code. (Ibrahimbhai v. State, AIR 1968 Gujarat 202; Panchayat Officer v. Jai Narain, AIR 1967 All 334 : Krishanlal Sadhu v. State, AIR 1967 Cal 275; Sona Ram Ranga Ram v. Central Government, AIR 1963 Punjab 510; A. Adinarayana v. State of Andhra Pradesh, AIR 1958 Andh Pra 16. However, in another set of cases, it was held that writ proceeding being a proceeding of a special nature and not one being in a Court of civil jurisdiction Section 141 of the Code was not applicable. (Bhagwan Singh v. Additional Director Consolidation, AIR 1968 Punjab 360; Chandmal v. State, AIR 1968 Rajasthan 20; K. B. Mfg. Co. v. Sales Tax Commissioner, AIR 1965 All 517; Ramchand v. Anandlal, AIR 1962 Gujarat 21; Bharat Board Mills v. Regional Provident Fund Commissioner, AIR 1957 Cal 702).

Even before the introduction of the explanation to Section 141 of the Code, this Court had occasion to examine the scope of the said section in the case of Babubhai Muljibhai Patel v. Nandlal Khodidas Barot, AIR 1974 SC 2105 : (1975) 2 SCR 71. It was said :

"It is not necessary for this case to express an opinion on the point as to whether the various provisions of the Code of Civil Procedure apply to petitions under Article 226 of the Constitution. Section 141 of the Code, to which reference has been made, makes it clear that the provisions of the Code in regard to suits shall be followed in all proceedings in any Court of civil jurisdiction as far as it can be made applicable. The words "as far as it can be made applicable" make it clear that, in applying the various provisions of the Code to proceedings other than those of a suit, the Court must take into account the nature of those proceedings and the relief sought. The object of Article 226 is to provide a quick and inexpensive remedy to aggrieved parties. Power has consequently been vested in the High Courts to issue to any person or authority, including in appropriate cases any government, within the jurisdiction of the High Court, orders of writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari. It is plain that if the procedure of a suit had also to be adhered to in the case of writ petition, the entire purpose of having a quick and inexpensive remedy would be defeated. A writ petition under Article 226, it needs to be emphasised, is essentially different from a suit and it would be incorrect to assimilate and incorporate the procedure of a suit into the proceedings of a petition under Article 226".

It can be said that in the judgment aforesaid, this Court expressed the view that merely on basis of Section 141 of the Code it was not necessary to adhere to the procedure of a suit in writ petitions, because in many cases the sole object of writ

jurisdiction to provide quick and inexpensive remedy to the person who invokes such jurisdiction is likely to be defeated. A Constitution Bench of this Court in the case of State of U.P. v. Vijay Anand, AIR 1963 SC 946 said as follows :- (Para 9)

"It is, therefore, clear from the nature of the power conferred under Article 226 of the Constitution and the decisions on the subject that the High Court in exercise of its power under Article 226 of the Constitution exercises original jurisdiction, though the said jurisdiction shall not be confused with the ordinary civil jurisdiction of the High Court. This jurisdiction, though original in character as contrasted with its appellate and revisional jurisdictions, is exercisable throughout the territories in relation to which it exercises jurisdiction and may for convenience, be described as extraordinary original jurisdiction".

When the High Court exercises extraordinary jurisdiction under Article 226 of the Constitution, it aims at securing a very speedy and efficacious remedy to a person, whose legal or constitutional right has been infringed. If all the elaborate and technical rules laid down in the Code are to be applied to writ proceedings the very object and purpose is likely to be defeated. According to us, in view of the conflicting opinions expressed by the different Courts, the Parliament by the aforesaid amending Act introduced the explanation saying that in Section 141 of the Code the expression "proceedings" does not include "any proceedings under Article 226 of the Constitution" and statutorily recognised the views expressed by some of the Courts that writ proceedings under Article 226 of the Constitution shall not be deemed to be proceedings within the meaning of Section 141 of the Code. After the introduction of the explanation to Section 141 of the Code, it can be said that when Section 141 provides that the procedure prescribed in the Code in regard to suits shall be followed, as far as it can be made applicable "in all proceedings in any Court of civil jurisdiction" it shall not include a proceeding under Article 226 of the Constitution. In this background, according to us, it cannot be held that the provisions contained in Order 22 of the Code are applicable per se to writ proceedings. If even before the introduction of the explanation to Section 141, this Court in the case of Babubhai v. Nandlal, (AIR 1974 SC 2105) (supra) had said that the words "as far as it can be made applicable occurring in Section 141 of the Code made it clear that in applying the various provisions of the Code to the proceedings other than those of a suit, the Court has to take into consideration the nature of those proceedings and the reliefs sought for" after introduction of the explanation the writ proceedings have to be excluded from the expression "proceedings" occurring in Section 141 of the Code. If because of the explanation, proceeding under Article 226 of the Constitution has been excluded, there is no question of making applicable the procedure of Code' as far as it can be made applicable' to such proceeding. The procedures prescribed in respect of suit in the Code if are made applicable to the writ proceedings then in many cases it may frustrate the exercise of extra-ordinary powers by the High Court under Articles 226 and 227 of the Constitution.

6. But then can it be said that as the provisions of Order 22 of the Code are not applicable to writ petitions, the party who has invoked the jurisdiction of the High Court by filing such writ petition under Articles 226 and 227 of the Constitution is at liberty to proceed with such writ petitions against a dead respondent ? Can the High Court pass an order without hearing the legal representative of such deceased respondent even in cases where right to sue survives against the

legal representative of such deceased respondent? If such legal representative is not brought on the record, any order passed against the original respondent after his death shall not be binding on them because they have not been heard. The order of the High Court shall be deemed to have been passed against a dead person. If the right of the petitioner to pursue the remedy survives even after the death of the original respondent to the writ petition, then on the same principle even the right to context that claim survives on the part of the legal representative of the deceased respondent. In such a situation, after the death of the respondent if the right to sue survives against the legal representative of such respondent, then the petitioner has to substitute the legal representative of such respondent before the writ petition can proceed and can be heard and disposed of. The petitioner has to take steps for substitution of legal representative within a reasonable time. It need not be impressed that it will be unreasonable on the part of the Court to implead the legal representative of the deceased respondent after lapse of several months or years and then to direct them to contest the claim of the petitioner merely on the ground that after the death of the original respondent the right, title or the interest of such respondent has devolved on them.

7. In the case of *Ram Kala v. Assistant Director, Consolidation of Holdings, Punjab, Rohtak*, AIR 1977 Punjab & Har 87, a Full Bench of three Judges held that Article 137 of the Schedule to the Limitation Act does not apply to an application for adding or substituting a party to a petition under Article 226 of the Constitution. It was also held that Section 141 of the Code cannot be pressed into service for applying the provisions including Order 22 of the Code in a petition under Article 226 of the Constitution. Later a Full Bench of five Judges of the same Court, in the case of *Teja Singh v. Union Territory of Chandigarh*, (AIR 1982 Punj & Har 169) (supra) held that in view of Rule 32 of the Writ Rules framed by the High Court under Article 225 of the Constitution which provided that in all matters in which no provision had been made by those Rules, the provisions of Civil Procedure Code shall apply *mutatis mutandis* in so far as they were not inconsistent with those Rules. It was held that the explanation which had been added to Section 141 of the Code by the aforesaid Amending Act, did not in any way nullified the effect of Rule 32 of the Writ Rules. Rule 32 of the Writ Rules is as follows :-

"32. In all matters for which no provision is made in these rules, the provisions of the Code of Civil Procedure, 1908, shall apply *mutatis mutandis* insofar as they are not inconsistent with these rules".

8. On a plain reading, Section 141 of the Code provides that the procedure provided in the said Code in regard to suits shall be followed "as far as it can be made applicable, in all proceedings". In other words, it is open to make the procedure provided in the said Code in regard to suits applicable to any other proceeding in any Court of civil jurisdiction. The explanation which was added is more or less in the nature of proviso, saying that the expression "proceedings" shall not include any proceeding under Article 226 of the Constitution. The necessary corollary thereof shall be that it shall be open to make applicable the procedure provided in the Code to any proceeding in any Court of Civil jurisdiction except to proceedings under Article 226 of the Constitution. Once the proceeding under Article 226 of the Constitution has been excluded from the expression "proceedings" occurring in Section 141 of the Code by the explanation, how on basis of Section 141 of the Code any procedure provided in the Code can be made applicable to a proceeding under Article 226 of the Constitution ? In this background, how merely on basis of Writ Rule 32 the provisions of the Code shall be applicable to writ proceedings ? Apart from that, Section 141 of the Code even in respect of other proceedings contemplates that the procedure provided in the Code in regard to suits shall be followed "as far as it can be made applicable". Rule 32 of Writ Rules does not specifically make provisions of Code applicable to petitions under Articles 226 and 227 of the

Constitution. It simply says that in matters for which no provision has been made by those rules, the provisions of the Code shall apply *mutatis mutandis* in so far as they are not inconsistent with those rules. In the case of *Rokyaybi v. Ismail Khan*, AIR 1984 Karnataka 234, in view of Rule 39 of the Writ Proceedings Rules as framed by the Karnataka High Court making the provisions of Code of Civil Procedure applicable to writ proceedings and writ appeals, it was held that the provisions of the Code were applicable to writ proceedings and writ appeals.

9. We have not been able to appreciate the anxiety on the part of the different Courts in judgments referred to above to apply the provisions of the Code to Writ Proceedings on the basis of Section 141 of the Code. When the Constitution has vested extraordinary power in the High Court under Articles 226 and 227 to issue any order, writ or direction and the power of superintendence over all Courts and tribunals throughout the territories in relation to which such High Court is exercising jurisdiction, the procedure for exercising such power and jurisdiction, have to be traced and found in Articles 226 and 227 itself. No useful purpose will be served by limiting the power of the High Court by procedural provisions prescribed in the Code. Of course, on many questions, the provisions and procedures prescribed under the Code can be taken up as guide while exercising the power, for granting relief to persons, who have invoked the jurisdiction of the High Court. It need not be impressed that different provisions and procedures under the Code are based on well recognised principles for exercise of discretionary power and they are reasonable and rational. But at the same time, it cannot be disputed that many procedures prescribed in the said Code are responsible for delaying the delivery of justice and causing delay in securing the remedy available to a person who pursues such remedies. The High Court should be left to adopt its own procedure for granting relief to the persons concerned. The High Court is expected to adopt a procedure which can be held to be not only reasonable but also expeditious.

10. As such even if it is held that Order 22 of the Code is not applicable to writ proceedings or writ appeals, it does not mean that the petitioner or the appellant in such writ petition or writ appeal can ignore the death of the respondent if the right to pursue remedy even after death of the respondent survives. After the death of the respondent it is incumbent on the part of the petitioner or the appellant to substitute the heirs of such respondent within a reasonable time. For purpose of holding as to what shall be a reasonable time, the High Court may take note of the period prescribed under Article 120 of the Limitation Act for substituting the heirs of the deceased defendant or the respondent. However, there is no question of automatic abatement of the writ proceedings. Even if an application is filed beyond 90 days of the death of such respondent, the Court can take into consideration the facts and circumstances of a particular case for purpose of condoning the delay in filing the application for substitution of the legal representative. This power has to be exercised as well known and settled principles in respect of exercise of discretionary power by the High Court. If the High Court is satisfied that delay, if any in substituting the heirs of the deceased respondent was not intentional, and sufficient cause has been shown for not taking the steps earlier, the High Court can substitute the legal representative and proceed with the hearing of the writ petition or the writ appeals, as the case may be. At the same time the High Court has to be conscious that after lapse of time a valuable right accrues to the legal representative of the deceased respondent and he should not be compelled to contest a claim which due to the inaction of the petitioner or the appellant has become final.

11. So far the facts of the present appeal is concerned, Bir Singh died on 9th December, 1971. The dispute related to consolidation of holding of lands. After the death of Bir Singh the right title and interest in the land shall be deemed to have devolved on his legal representative. As such the right to pursue the remedy against them survived even after the death of Bir Singh. But for pursuing the

claim against the legal representative of Bir Singh, the appellants ought to have taken steps to substitute him. Admittedly, no step was taken on behalf of the appellants till 14th March, 1975. As such the High Court was justified in dismissing the writ petition and no exception can be taken against the said order. The appeal accordingly fails and it is dismissed. But there shall be no order as to cost.

Appeal dismissed.