SUPREME COURT OF INDIA

Mithailal Dalsangar Singh

Vs.

Annabai Devram Kini

C.A.Nos.7396-97 of 2003

(R. C. Lahoti and Ashok Bhan JJ.)

16.09.2003

JUDGEMENT

R. C. Lahoti, J.

1. Leave granted.

2. A brief resume of relevant facts would suffice. There was an agreement to sell relating to the suit property entered into by the owners thereon, impleaded as defendants in the suit, in favour of three persons namely Bharat Singh, Mathai Lal Singh and Smt. Nirmala on 29th October, 1987. The three vendees joined as co-plaintiffs and filed a suit for specific performance of the agreement to sell. There was a prayer for the grant of ad interim injunction which was allowed by the learned single Judge of the High Court who was trying the suit. As against the order granting ad interim injunction, the defendants preferred an appeal and therein the three plaintiffs were impleaded as respondents. On 5th April, 1997 Bharat Singh, one of the plaintiffs expired. The appeal filed by the defendants came up for hearing before the Division Bench of the High Court. On 17th June, 2000, which was the date of hearing, a statement appears to have been made before the High Court that Bharat Singh had expired. The counsel for the plaintiff-respondents wrote a letter to the two surviving plaintiffs informing them of the factum of death of the third plaintiff and the need for taking steps for bringing the legal representatives on record. On 29th June, 2000 the legal representatives of the deceased plaintiff took out chamber summons on the Original Side of the High Court for being brought on record in the suit in place of the deceased plaintiff. The defendants in the suit objected to the prayer for impleadment submitting that the prayer was hopelessly barred by time and that the suit had abated. It was also submitted that inasmuch as the cause of action arising to the three plaintiffs was only one, the death of one of plaintiffs had resulted in the suit having abated in its entirety and, therefore, the prayer made by the legal representatives of the deceased plaintiff for being brought on record was not maintainable unless and until the other two surviving plaintiffs had also made a prayer for setting aside the abatement. That having not been done, the chamber summons at the instance of the legal representatives of the deceased plaintiff only was not maintainable. The learned single Judge allowed the prayer made by the legal representatives for condonation of delay in

moving the application, set aside the abatement of the suit and allowed the legal representatives to be brought on record. The learned single Judge held that the legal representative-applicants had duly established the sufficient cause for condonation of delay in moving the application for setting aside the abatement. To quote from the order of the learned single Judge, he held-

> "The chamber summons is hereby allowed in terms of prayers (a), (b) and (c)."

3. Prayers (a), (b) and (c) referred to in the order of the learned single Judge are as under :-

> "a) That delay in taking out Chamber Summons be condoned;
>
> b) That abatement of suit with regard to plaintiff No. 1 be set aside;
>
> c) That the applicants and respondent be brought on record in place of and instead of plaintiff No. 1 as per Schedule annexed hereto."

4. It appears that in the appeal preferred by the defendants pending in the High Court, the defendant-applicants also moved an application for bringing on record the legal representatives of the deceased plaintiff-respondent in that appeal.

5. The defendants laid challenge to the order dated 23-3-2001 of the learned single Judge by preferring an intra-Court appeal which has been allowed and the order of the learned single Judge has been set aside. The result is that the suit stands dismissed as having abated. The aggrieved plaintiffs have filed this appeal by special leave.

6. A perusal of the order of the Division Bench shows that an objection was taken to the maintainability of the Letters Patent Appeal but the same has been overruled by the Division Bench forming an opinion that an order setting aside abatement and bringing on record the legal representatives of the deceased plaintiff amounts to 'judgment' within the meaning of the Letters Patent. The Division Bench has also held that the prayer made by the legal representatives of the deceased plaintiff and as allowed by the learned single Judge was only for setting aside the abatement of the suit as regards the plaintiff No. 1; there was neither a prayer made nor an order made by the learned single Judge setting aside the abatement of the suit in its entirety, and therefore, so far as the other two surviving plaintiffs are concerned, for failure on their part to make a prayer for setting aside the abatement, the suit continues to remain abated as against them, and therefore, the prayer, as also the order passed on that prayer, for setting aside the abatement only partly was bad in law and did not enure to the benefit of the surviving plaintiffs. The findings so arrived at by the Division Bench have been vehemently attacked by the learned Counsel for the appellants.

7. Having heard the learned Counsel for the parties we are satisfied that the appeal deserves to be allowed and the judgment of the Division Bench deserves to be set aside.

8. Inasmuch as the abatement results in denial of hearing on the merits of the case, the provision of abatement has to be construed strictly. On the other hand, the prayer for setting aside an abatement and the dismissal consequent upon an abatement, have to be considered liberally. A simple prayer for bringing the legal representatives on record without specifically praying for setting aside of an abatement may in substance be construed as a prayer for setting aside abatement. So also a prayer for setting aside abatement as regard one of the plaintiffs can be construed as a prayer for setting aside the abatement of the suit in its entirety. Abatement of suit for failure to move an application for bringing the legal representatives on record within the prescribed period of limitation is automatic and a specific order dismissing the suit as abated is not called for. Once the suit has abated as a matter of law, though there may not have been passed on record a specific order dismissing the suit as abated, yet the legal representatives proposing to be brought on record or any other applicant proposing to bring the legal representatives of the deceased party on record would seek the setting aside of an abatement. A prayer for bringing the legal representatives on record, if allowed, would have the effect of setting aside the abatement as the relief of setting aside abatement though not asked for in so many words is in effect being actually asked for and is necessarily implied. Too technical or pedantic an approach in such cases is not called for.

9. The Courts have to adopt a justice oriented approach dictated by the upper most consideration that ordinarily a litigant ought not to be denied an opportunity of having a lis determined on merits unless he has, by gross negligence, deliberate inaction or something akin to misconduct, disentitled himself from seeking the indulgence of the Court. The opinion of the trial Judge allowing a prayer for setting aside abatement and his finding on the question of availability of 'sufficient cause' within the meaning of sub-rule (1) of Rule (9) of Order 22 and of Section 5 of the Indian Limitation Act 1963 deserves to be given weight, and once arrived at would not normally be interfered with by superior jurisdiction.

10. In the present case, the learned trial Judge found sufficient cause for condona-tion of delay in moving the application and such finding having been reasonably arrived at and based on the material available, was not open for interference by the Division Bench. In fact the Division Bench has not even reversed that finding; rather the Division Bench has proceeded on the reasoning that the suit filed by three plaintiffs having abated in its entirety by reason of the death of one of the plaintiffs, and then the fact that no prayer was made by the two surviving plaintiffs as also by the legal representatives of the deceased plaintiff for setting aside of the abatement in its entirety, the suit could not have been revived. In our opinion, such an approach adopted by the Division Bench verges on too fine a technicality and results in injustice being done. There was no order in writing passed by the Court dismissing the entire suit as having abated. The suit has been treated by the Division Bench to have abated in its entirety by operation of law. For a period of ninety days from the date of death of any party the suit remains in a state of suspended animation. And then it abates. The converse would also logically follow. Once, the prayer made by the legal representatives of the deceased plaintiff or setting aside the abatement as regards the deceased plaintiff was allowed, and the legal representatives of the deceased plaintiff came on record, the constitution of the suit was rendered good; it revived and the abatement of the suit would be

deemed to have been set aside in its entirety even though there was no specific prayer made and no specific order of the Court passed in that behalf.

11. There is yet another aspect of the matter. As we have already noticed, the appeal against the order of ad interim injunction passed by the learned trial Judge was pending before the Division Bench. Therein the defendants had themselves moved an application for bringing on record the legal representatives of the deceased plaintiff, that is, the respondent in their appeal. The legal representatives being brought on record at any stage of the proceedings enures for the benefit of the entire proceedings. The prayer made by the defendants in their appeal for bringing on record the legal representatives of the deceased plaintiff-respondent in appeal was not opposed by the legal representatives or by any of the co-plaintiffs. Rather the prayer was virtually conceded to by the legal representatives themselves moving an application for being brought on record in the suit in place of the deceased plaintiff. In our opinion, the application made by the defendant-appellants in the appeal once allowed would have the effect of bringing the legal representatives on record, not only in the appeal but also in the suit. All that would remain to be done is the ministerial act of correcting the index of the parties by the applicants in appeal and then in the suit. In view of the defendants themselves having sought for impleadment of the legal representatives in the appeal the delay in moving the application in the suit by the legal representatives, being subsequent in point of time, became meaningless.

12. We are also of the opinion that the Letters Patent appeal against the order setting aside the abatement of the suit was not maintainable. What is a 'judgment' within the meaning of Letters Patent came up for the consideration of this Court in *Shah Babu Lal Khimji v. Behan D. Kangro*[1]. It was held that a decision by a trial Judge on a controversy which affects valuable rights of one of the parties is a 'judgment'. However, an interlocutory order cannot be regarded as a judgment but only those orders would be judgments which decide matters of moment or affect vital and valuable rights of the parties, and which work serious injustice to the party concerned. This Court further held that there is no inconsistency between Section 104 read with Order 43, Rule 1 of the CPC and the appeals under the Letters Patent. The Letters Patent do not exclude or override the application of Section 104 read with Order 43, Rule 1, CPC to internal appeals within the High Court. Even if it is assumed that Order 43, Rule 1 does not apply to Letters Patent appeals yet the principles governing those provisions would apply by a process of analogy. A perusal of Section 104 read with Rule 1 of Order 43 of the CPC shows that while an appeal is provided against an order refusing to set aside the abatement or dismissal of a suit; there is no appeal provided against an order whereby the abatement or dismissal of a suit has been set aside. Whether the trial Judge passed an order setting aside an abatement or allowed substitution of the legal representatives, no valuable right of parties was decided. The constitution of the suit was rendered good and the suit proceeded ahead for being tried on merits. Such an order does not amount to 'judgment' within the meaning of Letters Patent.

13. The learned counsel for the appellant has invited attention of the Court to the Full Bench decision of the Calcutta High Court in *Nurul Hoda and others v. Amir Hasan and another*[2], and the Division Bench decisions of the Punjab High Court in *Smt. Chando Devi v.*

Municipal Committee Delhi[3]*, and of the Bombay High Court in Maria Flaviana Almeida and others v. Ramchandra Santuram Asavie and others*[4].

14. In Nurul Hoda and others (supra), Sabyasachi Mukharji, J. (as his Lordship then was), speaking for the Full Bench, held that a decision setting aside an abatement does not in any way affect any right accrued to the defendant and, therefore, does not amount to a 'judgment'. No merits, in controversy between the parties, have been decided; the order merely reopens the controversy.

15. A Division Bench of the Punjab High Court, consisting of D. Faishaw and G. L. Chopra, JJ. in Smt. Chando Devi's case (supra) has held that the order setting aside the abatement of a suit or appeal is not a decision which affects the merits of the question between the parties by determining some right or liability in the suit. Such an order cannot be regarded as a deciding a question materially in issue between the parties and directly affecting the subject-matter of the suit and, therefore, it would not amount to a 'judgment'.

16. In Maria Flaviana Almeida and others case (supra), Chief Justice Beaumont speaking for the Division Bench observed that an order setting aside an abatement is really one in procedure. The party originally had a cause of action which through no fault of their own came to an end by the death of their opponent and the effect of setting aside the abatement is merely to excuse delay in restoring the suit to an actionable condition. The Division Bench held that the order setting aside an abatement does not affect the merits of the dispute between the parties though it certainly determines a right and, therefore, does not amount to a 'judgment'.

17. We find ourselves in agreement with the view so taken by the High Courts.

18. The Calcutta and Bombay decisions were cited in the High Court also. In its impugned judgment the Division Bench has opined that the two rulings had no applicability to the case at hand. As to the Calcutta decision the impugned judgment states that it was a simple case of setting aside abatement while in the present case on account of the inaction of the plaintiffs Nos. 2 and 3 in seeking setting aside of the abatement qua them the suit had abated as a whole, depriving the Court of its jurisdiction to set aside the abatement as against deceased plaintiff only. We cannot countenance the narrow technical view so taken by the Division Bench for the reasons already stated.

19. The appeals are allowed. The judgment of the Division Bench is set aside. Instead the order dated 29-3-2001 passed by learned single Judge is restored.

Appeals allowed.

[1]*AIR 1981 SC 1786*
[2]*AIR 1972 Cal 449*
[3]*AIR 1961 Punjab 424*
[4]*AIR 1938 Bom 408*