

PUNJAB AND HARYANA HIGH COURT

Ram Kala

Vs

Assistant Director

Letters Patent Appeal No. 209 of 1974

(R.S. Narula, C.J., O. Chinnappa and Surinder Singh, JJ.)

15.12.1976

ORDER

R.S. Narula, C.J

1. Whether Article 137 of the Schedule to the Limitation Act (36 of 1963) does or does not apply to an application for adding or substituting parties to a petition under Article 226 of the Constitution is the important question of law which has to be decided before this appeal under clause 10 of the Letters Patent against the dismissal of the appellant's writ petition by a learned Single Judge of this Court can be heard and considered on merits. This question has arisen in the following circumstances :-

2. By order, dated May 20, 1959 (Annexure 'A' to the writ petition), under sub-section (4) of Section 21 of the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act (50 of 1948) (hereinafter called the Act), the Assistant Director, Consolidation of Holdings, Patiala, allowed the appeal of Lal Chand against Deepan (respondent No. 4 in the writ petition) and others; relating to repartition proceedings in village Samchana, tehsil and district Rohtak, and made certain changes which affected aforesaid Deepan, Baba Amar Dass (respondent No. 7 in the writ petition), and Ram Kala appellant. The appellant's petition under Section 42 of the Act was allowed by the order of the Director of Consolidation of Holdings, dated August 23, 1961 (Annexure 'B'). That order was, however, passed in the absence of Maya Chand and Daya Chand respondents Nos. 2 and 3, respectively. The said respondents succeeded in having that order set aside by the order of this Court, dated October 15, 1962, in Civil Writ 184 of 1962, on the ground that the same had been passed by the Director without affording Maya Chand and Daya Chand opportunity of being heard. The Additional Director, Consolidation of Holdings, Rohtak, then passed an order (Annexure 'C') to the same effect in the post remand proceedings on January 9, 1963, after hearing Maya Chand and Daya Chand. The ground on which the order Annexure 'A' had been modified and reversed to some extent on both the occasions under Section 42 was that contrary to the scheme no Chahi land had been allotted to Ram Kala appellant. The appellant was admittedly satisfied with the orders passed by the Additional Director on both the occasions. Maya Chand and Daya Chand not having felt satisfied even with the second order of the Additional Director again approached this Court in Civil Writ 514 of 1963. By order, dated

November 3, 1965, this Court (A. N. Grover, J. as he then was) allowed the writ petition, and quashed the order of the Additional Director on the short ground that he had no jurisdiction to hear any petition in revision under Section 42 of the Act against the order of the Assistant Director exercising the powers of the State Government in view of the binding judgment of their Lordships of the Supreme Court in *Roop Chand v. The State of Punjab and another*¹. The result was that the order of the Assistant Director, dated May 20, 1959, held the field and the appellant who was aggrieved of the same was left with no remedy available to him except to impugn the same in writ proceedings. He, therefore, filed in this Court Civil Writ 3036 of 1965, against the dismissal of which the present appeal has been filed. During the pendency of the writ petition Baba Amar Dass and Deepan (respondents Nos. 7 and 4, respectively) died on September 5, 1968, and January 1, 1970, respectively.

3. The application of the appellant, dated May 2, 1973 (Civil Miscellaneous No. 2908 of 1973), for bringing on record the legal representatives of the deceased respondents was filed on May 17, 1973, and was ultimately dismissed by the order of R. N. Mittal, J., dated November 23, 1973, on the short ground that it was barred by time according to law laid down by a Division Bench of this Court (D.K. Mahajan and B.R. Tuli, JJ.) in *Dula Singh v. Union of India and others*², wherein it has been held that the residuary article 137 of the Schedule to the Limitation Act applies to such an application; inasmuch as the application in the instant case had admittedly been filed after the expiry of more than three years from the death of Deepan as well as Baba Amar Dass, and no application under Section 5 of the Limitation Act had been filed for extending the period of limitation. When the writ petition came up for final disposal before Dhillon, J. on March 28, 1974, the learned Judge naturally felt helpless as he could not grant any relief to the appellant without affecting the rights of Deepan and Baba Amar Dass deceased respondents who were necessary parties to the petition, but were not represented before the Court by their heirs.

4. In this appeal against the order dismissing the appellant's writ petition (with which judgment the earlier order of Mittal, J., dated November 23, 1973, has merged), it has been argued by Shri Anand Swarup, the learned Senior Counsel for the appellant, that according to the aforesaid judgment of the Division Bench in *Dula Singh's* case (supra) writ proceedings do not abate by the death of a necessary party, and cannot be dismissed on that ground. learned counsel is no doubt correct in that respect, but a writ petition has to be dismissed if necessary parties have not been impleaded thereto. It is beyond question that the legal representatives of Deepan and Baba Amar Dass were necessary parties to the writ petition as their rights were bound to be affected by granting any relief to the appellant. There are, however, observations in the judgment of the Division Bench in *Dula Singh's* case (supra) to the effect that an application for bringing on record the legal representatives of a deceased party in a writ petition is governed by article 137 of the Schedule to the Limitation Act. The application which had been made in *Dula Singh's* case was within three years, and, therefore, the question as to what would be the fate of such an application filed after the expiry of the period of three years did not arise before the learned Judges. The observations regarding application of article 137 were made by the Division Bench while repelling the argument of the affected party in that case to the effect that article 120 of the Limitation Act applied, and the application given in that case after the expiry of more than 90 days from the death of the deceased party was barred by time. The parties to that case were, therefore, not interested in agitating that limitation for such an application could be even more than three years.

5. Mr. Anand Swarup has placed reliance on the judgment of a learned Single Judge of this Court (Tek Chand, J.) in *Jowala Singh Prem Singh and others v. Malkan Nasirpur and others*³ ; wherein it has been held that the principle of abatement of proceedings under Order 22 of the Civil Procedure Code has been extended by rule 11 of that order to the case of appeals, but there being no mention of its applicability to revisions, the maxim *inclusio unius est exclusio alterius* should apply, and by restricting the application of the rule of abatement expressly to suits and appeals, the intention of the legislature was to exclude from its purview cases arising from proceedings in revision. Counsel submits that he wants to extend the principle laid down by Tek Chand, J. in *Jowala Singh Prem Singh's case* (supra) to writ proceedings. It is, however, not necessary for him to do so as even the later Division Bench in *Dula Singh's case* (supra) has unequivocally, and in our opinion correctly, held that the provisions of Order 22 governing the case of abatement during the pendency of a suit do not apply to proceedings under Article 226 of the Constitution. The difficulty in the way of the appellant is that of limitation for making such an application. I am at the moment inclined to think that in the face of the fact that there is no period of limitation prescribed for filing a writ petition and that even after the dismissal of the petition on account of want of necessary parties, the appellant has a right to file a fresh writ petition by impleading all the necessary parties subject to his explaining the delay in filing the petition on the satisfaction of the Court, and further in view of the fact that no ordinary law made by the Parliament or the Legislature of any State can override or affect the provisions of the Constitution, and the remedy by way of a writ petition is provided by Article 226 of the Constitution, it is not correct to invoke and apply any provision of the Limitation Act either to the writ petitions themselves, or to any application which may have to be filed for keeping the writ petition alive or for seeking effective relief therein unless some amendment to that effect is made in Article 226 of the Constitution itself. It can well be argued that since while holding that there is no period of limitation for a petition under Article 226 of the Constitution their Lordships of the Supreme Court have observed in the *State of Madhya Pradesh and another v. Bhailal Bhai*⁴, , that a petition filed after the expiry of the normal period for seeking relief claimed therein in a suit should not ordinarily be entertained, the same principle should be applied to an application for substitution of deceased parties by their heirs in a writ petition. Even if that principle is invoked, the expiry of the ordinary period of limitation laid down for a similar application in a suit would not be an absolute bar to the entertainment of an application for the same relief in writ proceedings, and the question of delay in such cases will have to be decided on the facts and circumstances of each case as is done in the case of a writ petition itself without being deterred by any mandatory requirement of the Limitation Act. We, however, feel that if ultimately we are persuaded to take the view which I am inclined to take at the moment, our decision will go contrary to the observations of the Division Bench in *Dula Singh's case* (supra).

6. I, therefore, consider that in these circumstances we should refer this case to a Bench of more than two Judges to consider and decide whether the provisions of article 137 of the Schedule to the Limitation Act, 1963, apply to applications for bringing on record the legal representatives of the deceased parties, or the applications for adding new parties in a writ petition. Since the answer to that question either way will leave nothing more to be decided in this appeal, the appeal itself may be decided by the Full Bench after answering the above-mentioned question. The costs of the parties in the present shall abide the result of the hearing of the appeal by the Full Bench.

M.R. Sharma, J.

6. I agree.

M.R. Sharma, J.

(7) The facts of the case are given in the elaborate order of reference prepared by my Lord the Chief Justice and need not be repeated all over again.

8. The decision of the case depends upon the answer to the following question :-

Whether Article 137 of the Schedule to the Limitation Act (36 of 1963) does or does not apply to an application for adding or substituting parties to a petition under Article 226 of the Constitution ?

9. Order 22, Rule 4, Civil Procedure Code, lays down that 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 or sole surviving defendant dies and the right to sue survives, the Court, on an application given in that behalf shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit. These provisions have been made expressly applicable to appeals by virtue of rule 11 of Order 22, Civil Procedure Code. However, there is no express provision in the Civil Procedure Code making the provisions of Order 22, rule 4, of the said Code applicable to the revision petitions. Consequently, this Court has held in a series of judgments that Order 22 of the Code does not apply to the revision petitions. See in this connection *Jowala Singh Prem Singh and others v. Malkan Nasirpur and others*, (supra), *Ram Saran Dass Tara Chand v. Ram Richhpal L. Mannu Lal and another*⁵, and *Smt. Dhan Devi and another v. Bakshshi Ram and another*⁶.

10. It is, however, argued that in a petition under Article 226 of the Constitution of India, civil rights of the parties are involved and the procedure laid down in the Civil Procedure Code, so far as it can be made applicable to proceedings which partake of the nature of civil proceedings and by virtue of Section 141 of the Code and the other provisions of the Code including Order 22, does apply to such proceedings.

11. While exercising jurisdiction under Article 226 of the Constitution, this Court does not try a "suit" as is ordinarily understood. The word "suit" is not defined in the Civil Procedure Code. However, in *Hansraj Gupta and others v. Dehra Dun Mussoorie Electric Tramway Co. Ltd.*⁷, it was held that the word "suit" ordinarily means, and apart from some context must be taken to mean, "a civil proceeding instituted by the presentation of a plaint." Similar view was taken by the Supreme Court in *Nawab Usmanali Khan v. Sagar Mal*⁸. The Court observed -

'Now, a proceeding under Section 14 read with Section 17 of the Indian Arbitration Act, 1940, for the passing of a judgment and decree on an award does not commence with a plaint or a petition in the nature of a plaint, and cannot be regarded as a suit and the parties to whom the notice of the filing of the award is given under Section 14(2) cannot be regarded as used in any Court otherwise competent to try the suit'.

12. The proceedings under Article 226 of the Constitution relating to civil matters are no doubt civil proceedings but on that ground alone it cannot be held that the Civil Procedure Code governs such proceedings. This Court may while exercising jurisdiction under Article 226 of the

Constitution draw upon the principles enunciated in the Civil Procedure Code, for the principles contained therein are by and large based on the principles of natural justice. Nevertheless, it can devise its own procedure for rendering speedy and efficacious justice in the circumstances of the case. Section 141 of the Civil Procedure Code lays down that the procedure provided in that 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 but this provision cannot be pressed into service for putting procedural fetters in the way of this Court for exercising jurisdiction under Article 226 of the Constitution for, the adoption of that course would practically strangle this jurisdiction. In *Babubhai Muljibhai Patel v. Nandlal Khodidas Barot and others*⁹, the Court took special notice of the words "as far as it can be made applicable" in Section 141, Civil Procedure Code, and held

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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 or 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 petitions, 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."

13. Similar view was expressed by R.S. Sarkaria, J. (now a learned Judge of the Supreme Court), in *Bhagwan Singh and others v. Additional Director of Consolidation, Punjab, Ferozepore and another*¹⁰. It was observed -

"What is provided in Section 141 is that the procedure laid down in the Code in regard to suits is to be followed so far as it can be, in all proceedings in any Court of civil jurisdiction. A High Court, when it exercises extraordinary jurisdiction under Article 226 of the Constitution, cannot, in my opinion, be said to be a Court of civil jurisdiction. This special jurisdiction of a High Court 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 of Civil Procedure laid down in the Code, were to be imported through Section 141 of the Code into these writ proceedings, their very purpose is likely to be defeated by their becoming bogged in procedural delays. In short, the provisions of the Civil Procedure Code do not, in terms, govern writ proceedings under Article 226 of the Constitution."

14. In *K.L. Bhansali v. The Chief Controller of Imports and Exports*¹¹, R.S. Narula, (as the learned Chief Justice then was) observed -

"Moreover, I am inclined to think that if even one of the legal representatives of the deceased petitioner had claimed to be brought on record he could have been allowed to prosecute the writ petition. The law of abatement does not apply to petitions under Article

226 of the Constitution. All that has to be seen is whether the right which entitled the deceased to invoke the writ jurisdiction of the High Court has or has not survived to the legal representative who claims to prosecute the petition."

Even in *Dula Singh v. Union of India and others*, (supra), Tuli, J., speaking for the Bench, endorsed this view in the following words :-

"The learned counsel for the appellant has urged that the provisions of Order 22 of the Civil Procedure Code do not apply to writ proceedings and in support of his submission he relies on the judgment of Shamsheer Bahadur, J. in *Shri Kirpal Singh v. The Deputy Custodian General*¹², The judgment of the learned Judge was confirmed in appeal by a Division Bench in *Shri Ajit Singh v. The Deputy Custodian*¹⁴, The same view was taken by another Division Bench of this Court in *Chaudhry Jai Ram Dass v. Gurcharan Singh*. The matter was examined by me in *Pali Ram v. The Additional Director Consolidation of Holdings, Hissar*, wherein I held that -

'The writ petition does not abate because of the death of the respondent on the ground that his legal representatives were not brought on record within the time prescribed in the Limitation Act. The legal representatives of a deceased petitioner or a deceased respondent can be brought on the record under Order 1, Rule 10, Civil Procedure Code.'

While coming to that conclusion I had relied on the judgment of Shamsheer Bahadur, J. in *Kirpal Singh's case* (supra) and on the judgment of Narula, J. in *K.L. Bansali v. Chief Controller of Imports and Exports*, (supra), wherein the learned Judge had held that "the law of abatement did not apply to the petitions under Article 226 of the Constitution."

15. The learned counsel for the respondents then relied upon *Chandradeo Pandey and others v. Sukhdeo Rai and others*¹⁴, in which it has been held that an application for substitution of heirs of a deceased party in a revision petition is governed by Article 137 of the Limitation Act. This authority does not advance the case of the respondents because in the instant case we are concerned with an application for the substitution of the heirs of a deceased party in a petition under Article 226 of the Constitution. Besides, so far as this Court is concerned, it has been consistently held that Order 22 Civil Procedure Code, does not apply to revision petitions. For the purposes of this case, it is not necessary to examine the correctness of the earlier judgments of this Court on this point *vis-a-vis* the view taken by the Allahabad High Court.

16. In view of the binding precedent of the Supreme Court and the preponderance of opinion in this Court, we hold that Order 22, Civil Procedure Code, does not apply to the writ proceedings.

17. However, in *Dula Singh's case* (supra), the learned Judges after coming to the abovementioned conclusion made some observations to the effect that an application for bringing on record the legal representatives of a deceased party in a writ petition is governed by Article 137 of the Schedule to the Limitation Act. The learned counsel for the respondents strongly relied on these observations and referred to Article 137 of the Limitation Act corresponding to Article 181 of the Limitation Act No. 9 or 1908, which reads as under :-

| Description of application | Period of Limitation | Time from which period begins to run |
|---|----------------------|--------------------------------------|
| 137. Any other application for which no period of limitation is provided elsewhere in this Division | Three years | When the right to apply accrues |

18. He argued that the language employed in the Article indicates that three years' period of limitation is provided for any application which is presented to a Court. We are unable to accept this contention raised by the learned counsel in view of the following observations made by their Lordships of the Supreme Court in *Sha Mulchand and Co. Ltd. v. Jawahar Mills Ltd., Salem*¹⁵.

"Learned Advocate, however, strongly relies on Article 181, Limitation Act. That Article has, in a long series of decisions of most, if not all, of the High Courts been held to govern only applications under the Civil Procedure Code. It may be that there may be divergence of opinion even within the same High Court but the preponderating view undoubtedly is that the Article applies only to applications under the Code."

19. As already noticed, this Court while exercising jurisdiction under Article 226 of the Constitution does not try a suit as commonly understood. It is settled law that when a Court is invested with a particular jurisdiction under an Act of the Parliament, it also gets invested with the authority to take all ancillary steps which are necessary to exercise that jurisdiction. A petition presented to this Court exercising jurisdiction under Article 226 of the Constitution cannot necessarily be regarded as an application under the Civil Procedure Code. It is an entirely different matter that while entertaining and deciding such an application, this Court may draw upon the principles of the Civil Procedure Code which are based on equity, justice and good conscience but in doing so this Court seldom takes recourse to the penal provisions of the said Code. All that has to be seen is whether the grant of such an application would promote the ends of justice or not. We are, therefore, of the view that Article 137 of the Schedule to the Limitation Act cannot be held to govern an application filed in the High Court exercising jurisdiction under Article 226 of the Constitution of India.

20. There is yet another way of looking at the things. In case a writ petition is dismissed on the ground that the legal representatives of a necessary party could not be brought on record, the dismissal of the petition would not be regarded as a dismissal on merits and the order passed can not operate as a bar of *res judicata*. The petitioner could file another petition on the same subject and explain the delay by averring that he had been diligently fighting the earlier writ petition. If the High Court is then satisfied that manifest injustice done to such a petitioner cannot be avoided unless the newly filed writ petition is admitted to hearing, it would be open to it to entertain such a petition. Such a course would tend to increase procedural delays only instead of promoting the cause of justice. An interpretation which leads to such a result has to be avoided at all costs. In our considered opinion Dula Singh's case (*supra*) which lays down that Article 137

of the Schedule to the Limitation Act No. 36 of 1963 applies to an application for adding or substituting parties to a petition under Article 226 of the Constitution is not correctly decided.

21. For the aforementioned reasons, we are of the view that Article 137 of the Schedule to the Limitation Act No. 36 of 1963 does not apply to an application for adding or substituting a party to a petition under Article 226 of the Constitution.

22. In the result this appeal is allowed, the orders dated November 23, 1973, and March 28, 1974, passed by the learned Judges of this Court are set aside and the case is remanded to the learned Single Judge for a fresh decision in accordance with law, December 15, 1976.

O. Chinnappa Reddy, J.

23. I agree.

Surinder Singh, J

24. I agree.

Appeal allowed.

Cases Referred.

1 1963 PLR 576
21971 PLR 432 corresponding to ILR (1973) P&H 491
3AIR 1958 Pun 171
4AIR 1964 SC 1006
5AIR 1963 Pun 206
6AIR 1969 Pun and Har 270
7AIR 1933 Privy Cou 63
8AIR 1965 SC 1798
9AIR 1974 SC 2105
10AIR 1968 Pun and Har 360
111967 PLR 19
12CW 325/56, decided on 21.4.1961
13LPA 133/61, decided on 6.3.1963
14AIR 1972 All 504
15AIR 1953 SC 98