

RAJASTHAN HIGH COURT

Dharam Singh

Vs.

Mukhtiar Singh

S.B. Civil Misc. Appeal No. 308 of 2003

(PrakashTatia, J.)

17.03.2004

JUDGMENT

PrakashTatia, J.

1. Heard learned counsel for the parties.

This appeal is against the order dated 29th Jan., 2003 by which the first appellate court partly allowed the appeal of the appellants and remanded the matter back to the trial Court for deciding the suit afresh treating the suit as *ex parte* against the sole defendant Santa Singh, who died during the pendency of the suit.

2. This litigation has checked history. It is alleged that defendant on 20th April, 1973 agreed to sell the land in dispute to the plaintiff No. 1 and executed an agreement in favor of the plaintiff respondent No. 1 without getting the sell deed in his favor, the plaintiff agreed to sell the part of the land to the plaintiff No. 2 on 28th July, 1975. After about 14 years from first agreement, the plaintiffs filed present suit for specific performance of contract on 18th Dec., 1987. It appears that defendant Santa Singh was not served, therefore, the trial Court passed the order under Order 5 Rule 20 C.P.C. for service of the respondent publication of summon in newspaper. The trial Court application was passed the order on 7th April, 1992 to proceed *ex parte* against Santa Singh and fixed the date for evidence of the plaintiffs on 14th May, 1992. On 25th April, 1992. Santa Singh through his son, who was power of attorney holder of the defendant Santa Singh, submitted an application under Order 9 Rule 7 C.P.C. for setting aside *ex parte* order. During pendency of this application, the plaintiffs themselves informed the court on 20th Oct, 1992 that sole defendant Santa Singh expired on 24th Aug., 1992. The plaintiffs even got their injunction application dismissed only on this ground of death of sole defendant. After about more than five

months, on 8th Feb., 1992, the plaintiffs submitted an application seeking permission to implead the LRs of Santa Singh as parts in the suit without mentioning relevant provisions Order 22, Rule 4 C.P.C. One of the sons or the sole defendant Santa Singh, who had knowledge of the suit as he appeared as power of attorney holder of deceased Santa Singh submitted reply to the application on 30th July, 1993. The matter dragged on and ultimately, on 11th July, 1994, an another application was submitted by the plaintiff under Order 22 Rule 4(4) C.P.C. the trial Court by order dated 1st Nov., 1994 dismissed the suit after holding that the suit of the plaintiffs has already abated.

3. The plaintiffs preferred an appeal against the dismissal of their suit, which was allowed by the first appellate court by judgment and decree dated 17th March, 1997. The first appellate court remanded the matter back to the trial Court. The first appellate court directed the trial Court to decide all the applications, which were filed due to the death of the sole defendant Santa Singh and also ordered to hold inquiry about the date of death of the defendant Santa Singh.

4. Being aggrieved against the order of remand dated 17th March, 1997 passed by the appellate court, Dharm Singh, legal representative of sole defendant preferred S.B. Civil Revision Petition No. 442/1997 before this Court, which was dismissed on 24th April, 1998. The trial Court after remand not only allowed the application of the plaintiffs filed under Order 22 Rule 4(4) C.P.C. and held that there is no need to implead the LRs of the sole defendant Santa Singh as party in the suit, but interestingly the trial Court straightaway passed the decree on 2nd March, 2001, for specific performance of contract dated 20th April, 1973 by taking help of Order 8 Rule 10 C.P.C and the relevant fact is that the decree passed in the year 2001 in a suit, which was filed after about 14 years of the agreement, that too, without permitting the LRs of the defendant to become party in the suit.

5. The LRs of the deceased Santa Singh preferred the appeal against the judgment and decree dated 2nd March, 2001. That appeal was partly allowed by the first appellate court on 29th Jan., 2003. The first appellate court also upheld the order of the trial Court passed on the application under Order 22, Rule 4(4) C.P.C. and denied opportunity of hearing to the appellants, i.e. LRs of the sole defendant Santa Singh to take part in the suit filed by the plaintiffs, by specific order that the trial Court shall proceed and decide the suit treating the proceedings against the defendant Santa Singh as *ex parte*. The remand was necessitated because the first appellate Court held that the trial Court should not have decreed the suit under Order 8, Rule 10 C.P.C. and the trial Court should not have taken evidence of the plaintiffs.

6. All above facts show that the litigant suffered because of such type of court proceedings only. Admittedly, the agreement contains the date 20th April, 1973. The suit for specific performance of the said contract was filed on 18th Dec., 1987 after delay of about 14 years. The *ex parte* order was passed against the sole defendant on 7th April, 1992. The sole defendant himself in his own life time submitted the application under Order 9, Rule 7 C.P.C. and showed his willingness to contest the suit after setting aside the *ex parte* order. It will be worthwhile to mention here that the *ex parte order* was passed on 7th April, 1992 and application for setting aside the *ex parte* order was submitted in the same month on 25th April, 1992, which remained pending till sole defendant Santa Singh died. The plaintiffs themselves informed the court that the sole defendant Santa Singh died on 24th Aug., 1992. The plaintiffs themselves moved application under order 22 Rule 4 C.P.C. after inordinate delay on 8th Feb., 1993 despite they had knowledge that the sole defendant died on 24th Aug., 1992. Interestingly, the clever plaintiffs showed their cleverness by moving the application under Order 22 Rule 4(4) C.P.C. so as to deprive the LRs of the sole defendant Santa Singh to contest the suit.

7. The courts below were fully conscious that application filed on behalf of the sole defendant himself seeking setting aside of an *ex parte* order as pending, despite this the provisions of Order 22, Rule 4(4) C.P.C. were invoked by the plaintiffs and the court permitted them to invoke by passing the order ignoring the fact that the LRs had a right to proceed with the application for setting aside *ex parte* order passed by the court against the sole defendant as that application was never rejected by the court. Before deciding application for setting aside, the *ex parte* order was passed against the sole defendant, there could not have arisen any question for grant of permission to the plaintiffs under Order 22, Rule 4(4) Civil Procedure Code. The sub-clause (4) of the Order 22, Rule 4 C.P.C. provides that the court whenever thinks fit may exempt the plaintiff from necessity of substituting the LRs of any such defendant, who has failed to file a written statement or who has not filed it, has failed to appear and contest the suit at the hearing. A bare perusal of the said provisions clearly reveals that the litigants, who are not interested to contest the suit, then their LRs cannot claim better right, than from their successors. Here in the case, the sole defendant Santa Singh submitted the application for setting aside the *ex parte* order, which clearly shows that he intended to contest the suit. Therefore, till that application is decided, defendant Santa Singh, during his life time and thereafter, his LRs could not have lost his/their right to file the written statement because the law permits the party to file the statement upon setting aside the *ex parte* order. Therefore, no order under Order 22,

Rule 4(4) C.P.C. should have been passed in the facts of this case by the court below.

8. The question arises whether there was any justification for passing any order by the trial Court on application under Order 22, Rule 4(4) C.P.C., when the plaintiffs themselves moved the application under Order 22, Rule 4(1) C.P.C. for seeking permission to bring on record the LRs of the sole defendant Santa Singh. The Court below was under obligation to hear the LRs of the sole defendant on application for setting aside the *ex parte* order even before passing any order on any other application, may it be under Order 22, Rule 1 or under Order 22, Rule 4(4) C.P.C. When the application for setting aside the *ex parte* order filed by the sole defendant was pending and entire fate of the application under Order 22, Rule 4(4) C.P.C. was dependent upon the fate of the application filed by the sole defendant seeking setting aside the *ex parte* order, there was no reason for the Court to grant permission to plaintiff under Order 22, Rule 4(4) C.P.C.

9. The first appellate court in its impugned order dated 29th Jan., 2003 very strangely held that the application for setting aside the *ex parte* order passed against the sole defendant Santa Singh has become in fructuous because of the death of the sole defendant Santa Singh. The observation is absolutely illegal and the entire foundation of the order under Order, 22 Rule 4(4) C.P.C. is based upon this illegal reasoning. If that application for setting aside *ex parte* order would have been decided by the trial Court at proper Rule 4(4) C.P.C. filed by the plaintiff. It is emphasized that Order, 22 Rule 4(4) C.P.C. is not meant to be used in the manner in which it has been invoked by the plaintiffs and permitted by the two courts below. This is a serious matter that, the matter involving the property right of the parties are taken in such a light manner by the two courts below.

10. It will be worthwhile to recapitulate the brief facts of the case at this stage to find out whether the suit in the trial court could have proceeded at all or not. It is clear from the facts of the case that during the pendency of the application under Order 9, Rule 7 C.P.C. filed on 14th May, 1993 for setting aside the *ex parte* order dated 7th April, 1992 passed against the defendant on 22nd Oct., 1992, the plaintiffs themselves informed the trial Court that sole defendant Santa Singh expired. On this count alone, the plaintiffs got their application for temporary injunction dismissed, which is clear from the order-sheet dated 22nd Oct., 1992 recorded by the trial Court itself in proceedings registered under Order 39, Rules 1 and 2 C.P.C. (C.M. Case No. 55/89). Therefore on 27th Oct., 1992 itself the plaintiffs themselves got the positive information of the death of the sole defendant Santa Singh. The order-sheet dated

22nd Oct., 1992 is signed by the counsel for the plaintiffs as well as by the Counsel for the defendant, therefore, this order-sheet reveals that information was furnished in the Court by counsel for the parties including by counsel for the sole defendant about the death of sole defendant Santa Singh prior to 22nd Oct., 1992. Despite this fact, the plaintiffs did not choose to file any application for bringing on record the L.Rs of the sole defendant Santa Singh till 8th Feb., 1993. On 8th Feb., 1993, the plaintiffs submitted an application stating therein that on 6th Feb., 1993, the defendant's advocate furnished the information about the death of sole defendant by suppressing the fact recorded in the order-sheet dated 22nd Oct., 1992. In this application, the plaintiffs did not choose to give date of death of sole defendant Santa Singh. The plaintiffs submitted in the application that as the information was supplied by the counsel for the defendant on 6th Jan., 1993, therefore, the plaintiffs' application is within the limitation. The trial Court dismissed the application and held that the suit has abated because the plaintiffs themselves had knowledge of death of the defendant, which is clear from the order-sheet recorded in this very suit in Misc. Case No. 55/1989. The plaintiffs preferred an appeal wherein the plaintiffs produced a copy of the FIR wherein date of death of sole defendant Santa Singh was recorded as 5th Jan., 1993. The first appellate court found that the FIR is relevant piece of evidence for the purpose of finding out the date of death of sole defendant Santa Singh. Therefore, the first appellate court allowed the appeal and remanded back the matter to the trial Court to inquire into the exact date of death of sole defendant Santa Singh. The said order was challenged by the defendant by filing a revision petition No. 442/1997, which was dismissed by this court on 24th April, 1998. Therefore, the trial Court after remand from the first appellate court decided the applications under Order 22, Rule 4(1) & under Order 22, Rule 4(4) Civil Procedure Code. The trial Court in its order dated 2nd March, 2001 held that Santa Singh died on 5th Jan., 1993 and not on 24th Aug., 1992. The appellate court against the said order, by impugned order dated 29th Jan., 2003 held that Santa Singh, in fact, died on 24th Aug., 1992 and date of death of Santa Singh given in the FIR as 5th Jan., 1993 is only a mistake in the writing. But at the same time, the first appellate court observed that this fact is insignificant because of the reason that the trial Court observed that this fact is insignificant because of the reason that the trial Court already passed the order to proceed *ex parte* against the sole defendant Santa Singh. The first appellate court further held that in view of the sub-rule (4) of the Rule 4, Order 22 C.P.C. It was not obligatory upon the plaintiffs to bring on record the LRs of sole defendant Santa Singh, therefore, the suit has not abated. The first appellate court also observed that the LRs of Santa Singh did not

move any application for setting aside *ex parte* order, which was passed against Santa Singh (though the application filed by Santa Singh for setting aside *ex parte* order was pending in the suit).

11. The approach of the first appellate court holding that even when the application filed by Santa Singh in his life time for setting aside *ex parte* order was pending in the suit, still the LRs, who were not brought on record by the plaintiffs should also have moved an application for setting aside the same *ex parte* order, which was passed against Santa Singh and was under challenge by the application of Santa Singh himself, is absolutely perverse, illegal and contrary to the provisions of law. The sub-rule (4) of Rule 4 of Order 22 C.P.C. is only enabling the provision, which permits the Courts to exempt the plaintiffs from necessity of substituting the LRs of such defendant who has failed to file a written statement or who has not appeared to contest the suit. The sub-rule 4 of Rule 4 of Order 22 C.P.C. nowhere permits the parties themselves to exercise the discretion of not impleading the LRs of any of the defendant, who has not filed written statement or who has not appeared to contest the suit. In this case admittedly, the plaintiffs themselves submitted an application on 8th Feb., 1993 for bringing on record the LRs of the defendant, therefore, the suit could not have proceeded without deciding that application and the court was under obligation to issue notice of the application to the LRs of the sole defendant. Therefore, the appellate court's finding that the plaintiffs were not required to submit any application for bringing on record the LRs of sole defendant as the trial Court had already passed the *ex parte* order against the defendant is set aside.

12. So far as Santa Singh died on 24th Aug., 1998 is a finding of fact recorded by the first appellate court itself. Admittedly, the plaintiffs moved an application for bringing on record the LRs of sole defendant Santa Singh on 8th Feb., 1993, which was beyond the period of limitation and admittedly, no application for setting aside the abatement of the suit was filed by the plaintiffs. The reasons given in the application dated 8th Feb., 1993 that the plaintiffs came to know about the death of the defendant only on 6th Jan., 1993 is contrary to the fact recorded in the proceedings of the trial Court itself as the plaintiffs themselves got their injunction application in this very suit dismissed on 27th Oct., 1992 on account of death of sole defendant Santa Singh. Not only this, even if, plaintiffs can be permitted to take help of provision of Order 22 Rule 10A C.P.C., then also, the defendant's counsel complied with the said provision by giving information of death of Santa Singh in the court, which is clear from the order-sheet dated 22nd Oct., 1992.

13. It will be worthwhile to mention here that the plaintiffs' case in the application dated 8th Feb., 1993 is that the sole defendant Santa Singh died on 5th Jan., 1993. The plea taken by the plaintiffs that Santa Singh died on 5th Jan., 1993 appears to be absolutely false and only an after thought because the plaintiffs themselves, in their application dated 8th Feb., 1993, pleaded that their application is within the limitation as the defendant's advocate supplied the information about the death of sole defendant Santa Singh on 6th Jan., 1993. Meaning thereby, but for this information, the application is not in limitation. Apart from this, the plaintiffs cannot be permitted to withdraw from their admission, which they made in this very case on 22nd Oct., 1992 wherein they admitted that Santa Singh has died.

14. Therefore, apart from the reasons given by the first appellate court in view of the above more reasons, it is clear that Santa Singh died on 24th Aug., 1992. The plaintiffs failed to submit any application under Order 22 Rule 4 C.P.C. within the period of limitation even from the date of the information, which they got in the Court through counsel for the defendant on 22nd Oct., 1992. The plaintiffs further failed to move any application for setting aside the abatement thereafter. The Order 22, Rule 10A C.P.C. has been fully complied with by the counsel for the defendant is also clear from the order-sheet recorded in the Misc. Case No. 55/89 in the main suit itself as well as from the order-sheet recorded by the trial Court dated 22nd Oct., 1992 in the main suit. In view of the above reasons, the suit of the plaintiffs automatically abated on 24th Aug., 1992 itself. Therefore, the application filed by the plaintiffs under Order 22 Rule 4(4) C.P.C. on 11th July, 1992 itself was not maintainable and it is held that the said application was filed *mala fide*ly with ulterior motive and with object to prevent the defendant from contesting the suit.

15. In view of the above discussions, the appeal of the appellants is allowed. The order dated 29th Jan., 1993 passed by the Additional District Judge, *Raisinghnagar* is set aside and it is held that the sole defendant Santa Singh died on 24th Aug., 1992 and the suit of the plaintiffs abated. The application dated 8th Feb., 1993 filed by the plaintiffs for bringing on record the LRs of the sole defendant is dismissed. The application of the plaintiffs dated 11th July, 1994 filed under Order 22, Rule 4(4) C.P.C. is also dismissed. The suit of the plaintiffs is dismissed as abated. The appellants are entitled to the cost of Rs. 5,000/- as special cost.

Appeal allowed.