

RAJASTHAN HIGH COURT

BalmukundArora

Vs.

State of Rajasthan

Civil Restoration Appln. No. 72 of 2004 and S.B. C.W.P. No. 4674 of 1989
(Sunil Kumar Garg, J.)

15.09.2004

ORDER

Sunil Kumar Garg, J.

1. This restoration application has been filed by the petitioner-applicant Om Prakash, who is son of Ram Chandra, in capacity as LR of deceased Balmukund on 29-6-2004 with the prayer the writ petition being No. 4674/1989, which was dismissed vide order dated 25-9-1996 in compliance of the order of this Court dated 2-9-1996, be restored to its original number.

2. It arises in the following circumstances:

The deceased Balmukund filed a writ petition being S.B. Civil Writ Petition No. 4674/1989 against the respondents and when that writ petition was pending before this Court, the sole petitioner (deceased Balmukund) died on 22-3-1996 and thereafter, on 2-7-1996, an application under Order 22, Rule 4, Civil Procedure Code read with Section 151, Civil Procedure Code and Article 226 of the Constitution of India was filed by the present applicant-petitioner Om Prakash with the prayer that his name be substituted in place of deceased Balmukund as, according to Will executed by deceased Balmukund, he was his LR.

The said application dated 2-7-1996 was allowed by this Court vide order dated 12-7-1996 and it was further ordered that since in para 3 of the affidavit filed along with that application, the names of five persons were shown as LRs of deceased Balmukund, therefore, these five persons be also impleaded as LRs of the deceased Balmukund.

Thereafter, since amended cause title was not filed by the applicant petitioner, therefore, this Court passed a per-emptory order on 2-9-1996 stating that amended cause title be filed within a week, failing which, the writ petition shall stand dismissed without placing it before the Court for orders.

Thereafter, in compliance of the order of this Court dated 2-9-1996, the Dy. Registrar (Judl.) passed order on 25-9-1996 by which the writ petition was dismissed as amended cause title was not filed in compliance of the directions of this Court dated 2-9-1996. Thereafter, the present restoration application has been filed by applicant-petitioner Om Prakash on 29-6-2004 stating that due to inadvertence, amended cause title could not be filed. It was further submitted that when the order dated 25-9-1996 was passed by the Dy. Registrar (Judl.), the case was not shown in the cause list of Dy. Registrar (Judl.). It was further submitted by the applicant-petitioner that due to inadvertence and over-sight, compliance of filing amended cause title was not made and when legal representatives of deceased Balmukhand contacted their counsel, the file was searched and necessary enquiries were made and the fact that writ petition had been dismissed in default came to knowledge and in view of these facts, the present restoration application has been filed and it was prayed that the writ petition be restored to its original number and the *bona fide* mistake and delay for not filing the amended cause title be condoned. In support of the restoration application, affidavit of Sri AnandPurohit, Advocate has also been filed.

To that restoration application, a reply was filed by the respondents Nos. 4 and 5 on 29-7-2004 and in that reply, it was submitted that the present restoration application has been filed after lapse of 8 years for which there was no plausible explanation. It was further submitted that in para No. 5 of the restoration application, it was stated that legal representatives of deceased Balmukund contacted their counsel, but the present restoration application has been filed by one of the LRs of deceased Balmukund, namely, Om Prakash. Hence, averments made in the restoration application were vague and since there was a considerable delay in filing the restoration application, therefore, on that count, the same deserves to be dismissed.

Apart from this, it was further submitted by the respondents Nos. 4 and 5 that they had purchased the property long back in 1985/1988 after paying full consideration and the revision petition was filed by deceased Balmukund before the Board of Revenue, which was dismissed and aggrieved from that order, the writ petition was filed before this Court and the same was dismissed on 13-9- 1988 and therefore, a valuable right had accrued in favour of the respondents Nos. 4 and 5. Hence, it was prayed that the

present restoration application be dismissed.

Thereafter, on 6-8-2004, an application under Section 5 of the Limitation Act was filed on behalf of the applicant-petitioner Om Prakash with the prayer that the delay in filing restoration application was *bona fide* one and therefore, the same may be condoned.

It may be stated here that amended cause title was filed by the learned counsel for the applicant-petitioner Om Prakash on 6-8-2004.

It may further be stated here that since in the amended cause title, which was filed on 6-8-2004, rest LRs of deceased Balmukund have not been made party, therefore, on 18-8-2004, a fresh application was filed on behalf of the applicant petitioner Om Prakash with the prayer that he may be allowed to implead rest LRs of deceased Balmukund as proforma respondents and simultaneously, amended cause title to that effect was also filed.

The said application dated 18-8-2004 by which other LRs of deceased Balmukund were sought to be impleaded as proforma respondents, was contested by the respondents Nos. 4 and 5 by filing separate reply stating that since they were to be made as LRs of deceased Balmukund, therefore, compliance of order of this Court dated 12-7-1996 was not made. Hence, it was prayed that the said application be dismissed.

Thereafter, on 23-8-2004, a fresh application was filed on behalf of the applicant-petitioner Om Prakash that rest LRs of deceased Balmukund may also be substituted and since no power of Vakalatnama was given by them to the present counsel, rest LRs of deceased Balmukund may be permitted to be arrayed as proforma respondents.

3. I have heard the learned counsel for the applicant-petitioner and the learned counsel for the respondents Nos. 4 and 5 and gone through the entire materials available on record.

4. There is no dispute on the point that so far as the application for bringing on record the LRs of deceased Balmukund was concerned, the same was allowed by this Court vide order dated 12-7-1996.

5. There is also no dispute on the point that in compliance of the order of this Court dated 12-7-1996, amended cause title was to be filed, but the same was not filed and in view of this fact, peremptory order was passed by this Court on 2-9-1996 stating

that amended cause title be filed within a week, failing which the writ petition shall stand dismissed without placing it before the Court for orders and since that order dated 2-9-1996 was not complied with, therefore, the writ petition was dismissed vide order dated 25-9-1996 and thereafter, the present restoration application was filed by the petitioner-applicant Om Prakash on 29-6-2004.

6. The question for consideration is whether in the facts and circumstances just narrated above, present restoration application should be allowed or not.

Procedure prescribed for civil suit in Civil Procedure Code whether it applies to writ proceedings ?

7. There was a divergence of judicial opinion on the question whether all the procedures prescribed for suits apply mutatis mutandis to writ proceedings by virtue of Section 141, Civil Procedure Code. This divergence has been set at rest by the Explanation added by the Civil Procedure Code (Am.) Act, 1976 - the amendment coming into force with effect from February 1, 1977 (vide Notification No. GSR 15(E) dated January 14, 1977). It reads as follows :

"Section 141. Miscellaneous proceedings.---

Explanation.- In this section, the expression "proceedings" includes proceedings under Order 9, but does not include any proceeding under Article 226 of the Constitution."

This amendment however is not retrospective in operation (vide Section 96 of the Civil Procedure Code (Am.) Act, 1976). So the pending writ proceedings are not affected. The procedures provided in Civil Procedure Code are not applicable to writ proceedings.

8. It may be stated here that when the High Court exercises extra-ordinary jurisdiction under Article 226 of the Constitution of India, 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 Civil Procedure Code are to be applied in writ proceedings the very object and purpose is likely to be defeated. In view of the conflicting opinions expressed by the different Courts, the Parliament by the Amending Act, 1976 introduced the explanation saying that Section 141 of the Code the expression 'proceeding' does not include any proceedings under Article 226 of the Constitution and Statutorily recognized the views expressed by some of the Courts that writ proceedings under Article 226 of the Constitution shall not deemed to

be proceedings within the meaning of Section 141 of the Code. It can be said that the procedure prescribed in the Code in regard to the suits shall be followed as far as it can be made applicable to all proceedings in any Court of Civil jurisdiction, but it shall not include a proceeding under Article 226 of the Constitution. In this background, it cannot be held that the provisions contained in Order 22 of the Code are applicable *per se* to writ proceedings. For that, the law laid down by the Hon'ble Supreme Court in *Puran Singh v. State of Punjab*¹ may be referred to.

9. Thus, it can be concluded:-

(i) That provisions of Order 22, Civil Procedure Code are not *per se* applicable to writ proceedings.

(ii) That since writ proceedings being essentially different from suits, it is wrong to assimilate and incorporate the procedure for suits into the procedure for writ proceedings.

(iii) That strict provisions of the Civil Procedure Code do not apply to a petition under Article 226 of the Constitution of India as is clear from the Explanation to Section 141 of the Civil Procedure Code.

(iv) That though the provision of Order 9, Rule 9, Civil Procedure Code, in terms, does not apply to petitions under Article 226 of the Constitution of India, the principle underlying that provision in respect of judging sufficient cause can be applied to writ petitions also, taking into consideration the facts of each case.

Whether law of limitation is applicable in such matter?

10. When the provisions of the Civil Procedure Code do not apply to proceedings under Article 226 of the Constitution of India, similarly, there is no provision in the Limitation Act, 1963 providing limitation for making such applications. A petition under Article 226 of the Constitution of India can neither be termed as a suit nor appeal nor application which the Limitation Act would apply. Now if for filing a petition under Article 226, the law of limitation does not apply, a fortiori, the same principle would govern to applications to be made for the purpose of making applications for bringing the legal representatives of deceased petitioner or respondent on record. In other words, such application must be made within reasonable time and there should not be undue or unreasonable delay on the part of the applicant in making the application.

11. A proceeding under Article 226 not being a suit nor an application to which the Limitation Act applies, the provisions of that Act cannot be invoked in a proceeding under Article 226. No limitation is provided for such proceeding.

12. Thus, it can be said that law of limitation does not apply to filing of application under Order 22, Rule 4, Civil Procedure Code for bringing the LRs of deceased on record and law of limitation also does not apply to the writ proceedings. However, such application should be made within reasonable time and there should not be undue or unreasonable delay in making it.

13. The Hon'ble Supreme Court in *Ram Sumiran v. DDC* ² taking into consideration the rural background of the appellants and prevailing illiteracy and ignorance in the country, has held that the period of six years in filing an application for bringing legal representatives of deceased respondent on record was reasonable.

14. Before proceeding further, it may be stated here that in the present case, so far as taking of LRs of deceased Balmukund on record was concerned, that was done by this Court vide order dated 12-7-1996 and the writ petition was dismissed for not filing of amended cause title in time.

On sufficient cause

15. It may be stated here that a party cannot be made to suffer for the fault on the part of his Advocate if he himself is not at fault. The party having engaged an Advocate expects that his Advocate will take such steps as are necessary for the proper representation of the party concerned. If such an Advocate does not take the necessary steps resulting in the suit being dismissed for non-prosecution, the fault is of the Advocate and not of the party. Therefore, the plaintiff cannot be made to suffer for that.

16. Since law of limitation does not apply to filing of application under Order 22, Rule 4, Civil Procedure Code, therefore, each case would be judged on its own facts and if it is found that party has been guilty of avoidable delay, then on that ground, the Court can refuse to exercise extraordinary jurisdiction.

17. Keeping the above legal position in mind, the facts of the present case are being examined.

18. In the present case, application under Order 22, Rule 4, Civil Procedure Code for bringing the LRs of deceased Balmukund on record was allowed by this Court vide

order dated 12-7-1996 meaning thereby there was no delay in filing that application, but the delay, which has been caused in the present case was in filing of amended cause title and in my considered opinion, since law of limitation does not apply to writ proceedings and since provisions of Civil Procedure Code do not apply to writ proceedings and since sufficient cause and grounds for not filing the amended cause title in time and also for not filing restoration application within a reasonable time have been shown and apart from this, there is affidavit of advocate ShriAnandPurohit, therefore, in these circumstances, delay in filing the amended cause title as well as delay in filing the restoration application should be condoned and the restoration application should be allowed and all objections, which have been raised by the learned counsel for the respondents Nos. 4 and 5 should be rejected as interest of justice should not be defeated by rule of technicality.

19. It is made clear that had there would have been a question of not bringing the LRs of deceased Balmukund on record in time and such application would have been filed after lapse of 8 years, the position would have been different one. In the present case, LRs of deceased Balmukund had already been taken on record, but there was delay in filing amended cause title and for that delay, counsel for the applicant-petitioner has filed his affidavit and sufficient grounds and cause have been shown for not filing the amended cause title in time and therefore, such delay deserves to be condoned.

20. So far as filing of amended cause title in compliance of the order of this Court dated 12-7-1996 is concerned, it may be stated here that if the present applicant petitioner has made some of the LRs of deceased Balmukund as proforma respondents, all the same, it would be presumed that compliance of the order of this Court dated 12-7-1996 has been made.

For the reasons stated above, the present restoration application filed by the applicant petitioner Om Prakash is allowed and the delay in filing the amended cause title in compliance of the order of this Court dated 12-7-1996 is condoned and the writ petition is restored to its original number.

Application allowed.

Cases Referred.

1. (AIR 1996 SC 1092)
2. (AIR 1985 SC 606)