

RAJASTHAN HIGH COURT

Mangu Singh

Vs.

Banki Das

Civil Review Petn. No. 22 of 2004 In Civil Misc. Appeal No. 18 of 2004
(PrakashTatia, J.)

09.11.2004

ORDER

PrakashTatia, J.

1. Heard learned counsel for the petitioner.
2. This review petition is against the order dated 7-7-2004 passed by this Court dismissing the SBCMA No. 18/2004.
3. Brief facts of the case are that, a suit for eviction from the rented premises was filed by the plaintiff RamjiLal against Mangu Singh and ors. The suit was decreed by the trial Court on 30-9-1994. During pendency of the suit, respondent-plaintiff died on 21-5-1988. The appellants, after seven months from time of death of the respondent, submitted an application seeking permission to implead legal representatives of the respondent before the first appellant Court. The application was not supported by any affidavit and further, no application or affidavit for condonation of delay was filed by the appellants. Even there was no prayer for setting aside of the abatement of appeal in the application. Before above application could be decided by the Court, the appeal was dismissed in default on 7-1-1999.
4. According to learned counsel for the petitioner, the petitioners submitted an application for restoration of the above appeal on 30-10-2000. In this restoration application, the legal representatives of the original plaintiff RamjiLal were also impleaded as party. The first appellate Court, after notice to the legal representatives of deceased RamjiLal, restored the appeal by order dated 6-12-2000. After restoration, in the main appeal, one more application under Order 22, Rule 4, Civil Procedure Code was filed by the legal representatives of the tenant-defendant on 11-12-2000.

The facts in two applications were contradictory. To overcome from this difficult situation; two applications containing contradictory facts and to save his earlier application, the petitioners sought order of dismissal of their second application filed for bringing on record the legal representatives of the respondent and application filed under Section 5 of the Limitation Act upon which the Court dismissed the said applications as withdrawn. The first appellate Court after taking note of all the facts, by order dated 20-12-2003 dismissed the appellant's earlier application dated 11-12-1998 also on merits. The appellate Court held that the application was belated and no application under Section 5 of the Limitation Act has been filed by the appellant and no ground is made out for condonation of delay and further no application for setting aside of the appeal has been filed. The appellate Court, consequently dismissed the appeal of the appellants as abated vide order dated 22-11-2003.

5. Being aggrieved against the order of the trial Court dated 20-11-2003, the petitioners preferred appeal which was registered as SBCMA No. 18/2004. That appeal was also dismissed by this Court on 7-7-2004.

6. Now, the appellant has submitted this review petition seeking review of the order of this Court dated 7-7-2004 on the ground that after the dismissal of the main appeal of the petitioners, by the first appellate Court, the restoration application was filed by the appellants. The legal representatives of deceased RamjiLal were impleaded as party in that restoration application and the first appellate Court vide order dated 6-12-2000 allowed the restoration application of the petitioners-appellants, therefore, there was no necessity for obtaining any order from the Court for taking on record the legal representatives of deceased RamjiLal in the first appeal. According to learned counsel for the appellants, if the legal representatives are made party in the cross appeal or in collateral proceedings then in that fact situation those legal representatives may be treated to have been taken on record in the main suit or in the appeal.

7. According to learned counsel for the petitioner, the legal representatives of the respondent plaintiff had knowledge of the appeal after receipt of the notice of application for restoration of the first appeal, then they could have raised objection that the appeal had already abated and cannot be restored. No such objection was taken by the legal representatives of plaintiff respondent at that time and appeal was restored by the Court, then the appeal is restored for all purposes and the legal representatives of the deceased respondent though were not taken on record in first appeal by the order of the Court still they shall be deemed to have been taken on record in the appeal itself. Learned counsel for the petitioner relied upon the judgment

of Hon'ble the Supreme Court delivered in the case of *N. JayaramReddi v. The Revenue Divisional Officer and Land Acquisition Officer, Kurnool* reported in, ¹and judgment of Patna High Court delivered in the case of *SurajMandar v. Dev Mishra* reported in, ²

8. According to learned counsel for the petitioner once an error is brought to the notice of the Court, then the Court has ample power to correct the mistake. Learned counsel for the petitioner relied upon the judgment of Hon'ble Supreme Court delivered in the case of *Green View Tea Industries v. Collector, Golaghat, Assam*, reported in ³

9. I considered the submissions of learned counsel for the petitioners. It is clear from the record that the petitioners are seeking the review of the order passed by this Court on the basis of the grounds which were neither the grounds before the trial Court nor before this Court either, in memo of appeal or in arguments before this Court at the time of hearing of the appeal. Further, the plea is also based on law point that too, in the opinion of the Court, is not supporting the petitioners in any manner. Therefore, the review petition filed by the petitioners can be dismissed summarily on this Court alone. But since, according to learned counsel for the petitioners, the petitioner's plea is covered by the decision of the Hon'ble Apex Court, therefore, the point is considered by this Court.

10. According to learned counsel for the petitioners, since petitioners impleaded legal representatives of the deceased respondent in the restoration application filed for restoration of the appeal and that restoration application was allowed by the Court, therefore, there was no necessity for the appellants to obtain order for setting aside of abatement of appeal. Further there was no necessity of obtaining order to implead legal representatives of the deceased-respondent in the appeal wherein sole respondent died before dismissal of the appeal in default and his legal representatives were not taken on record in the appeal and though the application for bringing on record the Legal Representatives was not filed in time and abatement of the appeal was not set aside by the first appellate Court still the legal representatives of the sole respondent may be deemed to have been taken on record simply because the first appellate Court allowed the restoration application filed by the petitioners.

11. I do not find any force in the submissions of learned counsel for the petitioners because of the reason that the first appellate Court in its order, restoring the appeal, specifically ordered that restoration of appeal will not be taken to mean that the legal representatives of the deceased respondent are taken on record in the main appeal and

further ordered that this issue will be decided in the appeal, if there is any application pending for that purpose. Therefore, when an issue had been left open by the order of the Court specifically then it cannot be even argued that the issue stands decided by implication. The entire foundation of argument of learned counsel for the petitioners clearly proceeded upon wrong foundation and contrary to the order passed on his own application (application for restoration of the appeal). In view of the order dated 16 December, 2002 the first appellate Court was under obligation to hear the representatives of the sole respondent on application for taking them on record after restoration of the main appeal which was not decided by the first Court till the appeal was dismissed in default.

12. Apart from above reason, otherwise also there is no merit in the submission of learned counsel for the petitioners. The subject matter in the restoration application was limited one. For restoration of the appeal, the defaulting party is required to show sufficient cause for his absence when his case was called by the Court. In a case where the respondent had died and before his legal representatives are taken on record and the appeal was dismissed in default then the appellant can submit restoration application by impleading legal representatives of the deceased-respondent though they were not party in the appeal. While deciding the restoration application, the Court cannot decide the application which is pending in the appeal like, application for setting aside of abatement of the appeal or even application for taking on record the legal representatives of the deceased. The reason for this is that on the restoration of the appeal, the appeal shall stand restored to the stage where it was pending. The applications which were pending in the appeal at the time of dismissal of the appeal and stand dismissed only on account of dismissal of the appeal also get the life on restoration of appeal and those applications are required to be decided in accordance with law after hearing both the parties. This situation which is in present case, cannot be equated with the situations like; where there are two cross appeals and where, in one of the appeals legal representatives have been taken on record with the leave of the Court and no such application has been moved in cross appeal, or in a case where during the pendency of the appeal or suit some collateral or interlocutory application, or appeal arising out of that collateral proceeding was pending and legal representatives of the deceased were taken on record in that proceeding with the leave of the Court. In these types of cases the legal representatives are taken on record by the specific order of the Court after hearing the other party and after holding that legal representatives can be taken on record. As stated above in the case in hand, firstly, the first appellate Court itself specifically ordered that the legal representatives of the

respondent shall not be treated as taken on record in the appeal, therefore, legal representatives of the deceased-respondent cannot be treated to have been taken on record by the implication and against the specific order of the Court and secondly, the legal representatives of the deceased respondent were not taken on record in any proceeding with the permission of the Court and the petitioners impleaded the legal representatives of the deceased respondent in the restoration application in their own right for which the respondent's legal representatives could not have any objection so far as they being impleaded as party in the restoration application.

13. The facts of the case of N. JayaramReddi's case (AIR 1979 Supreme Court 1393) (supra) are different. In that matter, in one of the cross-appeals, legal representatives were taken on record. The Hon'ble Apex Court held that on this count alone even if legal representatives are not taken on the record of the other appeal, the appeal cannot be dismissed as abated. Therefore, in the above case the legal representatives had notice of the application, though in other appeal and after hearing them the Court allowed the application for impleading as party in the appeal and thereby the legal representatives got the opportunity of hearing on application whereas no such opportunity was given to the legal representatives in the case in hand.

14. In the case of, *SurajMandar v. Dev Mishra reported in* ⁴also the facts were different. In that case, the restoration petition was filed and in that restoration petition, a substitution petition was also filed impleading two sons of deceased respondent No.5 and that substitution application itself was allowed by the Court by order dated 10-5-1993 and thereafter, the restoration petition was allowed. Such is not the position in the present case which is clear from the facts and reason mentioned above.

15. Therefore, no ground is made out for review of the impugned order. Hence, the review petition is dismissed.

Review petition dismissed.

Cases Referred.

1. AIR 1979 SC 1393
2. AIR 1984 Pat 378
3. 2004 (4) SCC 122 :(AIR 2004 SC 1738)
4. AIR 1984 Pat 378