

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

FAO No. 192 of 1999.

Decided on : October 27, 2006.

Baldev Singh & ors.

.....Appellants.

VERSUS

State of H.P. & ors.

.....Respondents.

Coram

The Hon'ble Mr. Justice Surjit Singh, Judge.

Whether approved for reporting?

For the Appellants : Mr. Ramakant Sharma, Advocate.

For the Respondents : Mr. Ashok Chaudhary, Additional Advocate General, for respondent No. 1.

Surjit Singh, Judge (Oral)

Heard and gone through the record.

2. The present appeal is directed against the order of the District Judge, whereby a suit filed by some of the appellants and the predecessor of the other appellants, for declaration and injunction has been held to have abated in whole on account of non-bringing on record all the legal heirs of the deceased plaintiffs within time.

3. Relevant facts are that a suit was filed by some of the appellants and some other persons, seeking a decree of declaration that they were joint owners in possession of certain property described in the plaint and also seeking relief of injunction restraining

Whether the reporters of the local papers may be allowed to see the Judgment?

...2...

the respondent- defendant/ State of Himachal Pradesh, from interfering in the suit land. Relief of rendition of accounts in respect of the trees allegedly felled by the respondents- defendants from the suit land illegally and unauthorisedly was also sought. Respondents- defendants contested the suit and denied the title of the plaintiffs in respect of a part of the suit property.

4. During the pendency of the suit, some of the plaintiffs, namely Sahi Ram (plaintiff No.2), Roop Singh (Plaintiff No. 11) and Sewak Ram (Plaintiff No. 20) died. No steps were taken within the time limited by law for bringing on record their legal heirs. One of these plaintiffs had died in the year 1989 another in the year 1991 and the third in the year 1992. Two applications, one under Section 5 of the Limitation Act, and the other under Order 22, Rules 3 and 9 of the Code of Civil Procedure, were moved. In the application, under Section 5 of the Limitation Act, it was stated that the application for setting-aside abatement could not be moved within time as the legal heirs of the deceased plaintiffs were unaware of the pendency of the suit. In the other application, under Order 22, Rules 3 and 9 of the Code of Civil Procedure, prayer was made for setting aside the abatement and for substitution of the legal heirs of the above named three deceased plaintiffs.

5. Respondents opposed the prayer on the ground that there was long delay in making the application for condonation of delay as also in making the application for setting aside the abatement and that no cause, much-less sufficient cause, for

...3...

condonation of delay or for setting aside the abatement, had been shown.

6. Learned District Judge framed an issue to the effect whether there were sufficient grounds to condone the delay and also to set-aside the abatement, and then recorded the evidence led by the proposed legal heirs of the above named three deceased plaintiffs. Respondents- defendants did not lead any evidence. The learned District Judge has returned the finding that there are no sufficient grounds for condoning the delay in making the application for setting aside the abatement nor has any cause been shown for setting aside the abatement. The learned District Judge has further observed that on account of non-substitution of the legal heirs of the three deceased plaintiffs named above, the suit as a whole has abated, because all the plaintiffs pleaded a common cause of action which is inseparable, and therefore, partial abatement cannot take place, as that would lead to two conflicting judgements and decrees.

7. Grievance of the appellants is that the view taken by the learned District Judge is not correct. According to them, when there were a large number of plaintiffs, who were joint owners of the suit property and their shares were specified in the jamabandi, on account of the failure of the legal heirs of the deceased plaintiffs to come on record, the other plaintiffs could not have been deprived of their right to seek the declaration nor their claim could be held to have abated and that as a matter of fact, the suit even so far as it pertained to the shares of deceased plaintiffs, could not be said to have abated, because their interest was not adverse to the surviving plaintiffs and

...4...

their estate could be said to be represented by the surviving plaintiffs. It is also their plea that the provisions of Order 22 of the Code of Civil Procedure are procedural in nature and they can be pressed into service to defeat the substantive rights of the parties, particularly in a case like the present one where one or a few of the plaintiffs, having common cause of action, dies/ die and his/their L.Rs do not apply for coming on record within time.

8. I have heard the learned counsel for the parties and gone through the record. I find a great deal of merit in the contention of the counsel for the appellants that as a matter of fact, even the claim of the deceased could not be said to have abated as the other plaintiffs represented their interest in the suit and therefore, the surviving plaintiffs could have pursued the suit on behalf of the deceased plaintiffs. A constitutional Bench of the Hon'ble Supreme Court in **Sardar Amarjit Singh Kalra (DEAD) by LR's and others** vs. **Pramod Gupta (SMT) (DEAD) by LR's and others** and some other connected matters [2003 (3) SCC 272], has declared the law covering such a situation in the following words vide para-26:-

“Laws of procedure are meant to regulate effectively, assist and aid the object of doing substantial and real justice and not to foreclose even an adjudication on merits of substantial rights of citizen under personal, property and other laws. Procedure has always been viewed as the handmaid of justice and not meant to hamper the cause of justice or sanctify miscarriage of justice. A careful reading of the provisions contained in Order 22 CPC as well as the subsequent amendments thereto would lend credit and support to the view that they were devised to ensure their continuation and culmination in an effective adjudication and not to retard the

further progress of the proceedings and thereby non-suit the others similarly placed as long as their distinct and independent rights to property or any claim remain intact and not lost forever due to the death of one or the other in the proceedings. The provisions contained in Order 22 are not to be construed as a rigid matter of principle but must ever be viewed as a flexible tool of convenience in the administration of justice. The fact that the khata was said to be joint is of no relevance, as long as each one of them had their own independent, distinct and separate shares in the property as found separately indicated in the jamabandi itself of the shares of each of them distinctly. We are also of the view that the High Court should have, on the very perception it had on the question of abatement, allowed the applications for impleadment even de hors the cause for the delay in filing the applications keeping in view the serious manner in which it would otherwise jeopardize an effective adjudication on merits, the rights of the other remaining appellants for no fault of theirs. Interests of justice would have been better served had the High Court adopted a positive and constructive approach than merely scuttled the whole process to foreclose an adjudication of the claims of others on merits. The rejection by the High Court of the applications to set-aside abatement, condonation and bringing on record the legal representatives does not appear, on the peculiar nature of the case, to be a just or reasonable exercise of the Court's power or in conformity with the avowed object of the Court to do real, effective and substantial justice. Viewed in the light of the fact that each one of the appellants had an independent and distinct right of his own not interdependent upon one or the other of the appellants, the dismissal of the appeals by the High Court in their entirety does not constitute a sound, reasonable or just and proper exercise of its powers. Even if it has to be viewed that they had a common interest, then the interests of justice would require the remaining other appellants being allowed to pursue the appeals for the benefit

...6...

of those others, who are not before the Court also and not stultify the proceedings as a whole and non-suit the others as well.”

9. The aforesaid declaration of law by the Hon’ble Supreme Court applies to the facts of the present case on all fours. Therefore, the appeal is accepted. The impugned order is set-aside. The applications, under Section 5 of the Limitation Act, and under Order 22, Rules 3 and 9, Code of Civil Procedure, as moved by the legal heirs of the deceased plaintiffs Sahi Ram, Roop Ram and Sewak Ram, are allowed and the L.Rs. of the above named three deceased plaintiffs, as named in the application, under Order 22, Rules 3 and 9 of the Code of Civil Procedure, are ordered to be substituted as plaintiffs in their place. The appeal stands disposed of.

10. The parties are directed to appear before the learned District Judge on 28th November, 2006, for further proceeding in the suit. Record of the District Judge be returned with a copy of this order, within a week.

October 27, 2006.
(Hem)

(Surjit Singh)
Judge.