DWARIKA PRASAD

v.

NIRMALA AND ORS.

(Civil Appeal No. 8407 of 2009)

DECEMBER 17, 2009

[B. SUDERSHAN REDDY AND J.M. PANCHAL, JJ.]

Suit: Restoration of suit – Suit for partition of joint properties filed by deceased father – Dismissed as withdrawn – Right of plaintiff's daughter to restore the suit after death of plaintiff – Held: Daughter and legal representative are entitled to continue the suit in view of the provisions of Hindu Succession Act – Only when right to sue is personal to deceased, same would not survive for benefit of his legal representatives – As per record she came to know later on that fraud was committed while getting partition suit dismissed as withdrawn – Hence, she was entitled to file application for restoration of the suit – Hindu Succession Act, 1956 – s.6 – Code of Civil Procedure, 1908 – O.22 r.3.

Partition suit – Withdrawal of – Permissibility – Held: In a suit for partition of joint properties every defendant is also in the capacity of the plaintiff and is entitled to decree in his favour, if it is established that he has share in the properties – On facts, suit for partition of the joint properties, dismissed as withdrawn without notice to another brother, who was also entitled to share in the properties – Suit directed to be restored – Suit – Code of Civil Procedure, 1908 – O.23 r.1.

The father of respondent no.1 filed suit for partition of joint properties. The suit was decreed. In first appeal, High Court set aside decree and remanded matter to trial court for fresh decision. Against order of remand, father of respondent no. 1 filed LPA. On 24.2.1997, an application for withdrawal of LPA was filed. The LPA was dismissed as withdrawn on the same day. On 28.2.1997,

A another application was filed for withdrawal of partition suit. The suit was dismissed as withdrawn on same day. On 11.8.1998, father of respondent no.1 expired. Respondent no.1 filed application for recalling the order dated 24.2.1997 on the ground that the application of
B withdrawal did not bear signature of her father and her father's signatures were forged. It was mentioned in the application that one J.P. Sharma, advocate, had noted his appearance on behalf of her father in partition suit subsequently without seeking no objection certificate
C from the previous counsel, who had filed the plaint, and thereafter filed application for withdrawal of LPA, which was illegal and, therefore, the order disposing of the LPA as withdrawn should be recalled.

High Court allowed the application for recalling the
D order dated 24.2.1997 observing that fraud was played upon the Court and directed the Registrar of the Court to file a complaint against advocate J.P. Sharma and also against advocate who had identified the signature of father of the respondent No. 1. The High Court also
E directed the Registrar to initiate criminal proceedings against the appellant who was supposed to be the beneficiary of the act of forging for initiating criminal proceedings by filing a complaint. In SLP, said order was upheld.

F After hearing LPA, it was dismissed by High Court as not maintainable. SLP thereagainst was also dismissed. Thus order of remand became final.

The trial court allowed the application of respondent
G no.1 for restoration of partition suit. High Court upheld the same. Hence the present appeal.

Dismissing the appeal, the Court

HELD: 1. It is well settled that where the right to sue is personal to the deceased, the same does not survive
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for the benefit of his legal representatives. There is no manner of doubt that late father of the respondent No. 1 had filed suit for partition of the joint properties. On his death right to sue survived and the respondent No. 1 being his daughter and legal representative was entitled to continue the suit in view of the provisions of Hindu Succession Act. The deceased who was a male Hindu, claimed interest in the joint properties which were subject matter of suit for partition. The record does not indicate that he had executed a Will though the appellant claimed that he had executed a Will in favour of 'V'. The said 'V' did not apply for being impleaded as a party to the proceedings nor claimed interest in the properties of the deceased. He, having died intestate, his share in the joint properties would devolve by intestate succession as provided by Section 6 of the Hindu Succession Act, 1956. Section 8 of the said Act which deals with general rules of succession in the case of males, provides that the property of a male Hindu dying intestate shall devolve firstly upon the heirs, being relatives specified in Class I of the Schedule to the Act. A daughter is specified as one of the relatives in Class I of the Schedule. Therefore, there is no manner of doubt that the share of the deceased plaintiff in the suit properties would devolve upon her, if suit for partition is decreed. Rule 3 of Order XXII CPC stipulates that when a sole plaintiff dies and the right to sue survives, the Court on an application made in that behalf, should cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit. Thus, the respondent No.1 was entitled to be substituted in place of her deceased father. The record shows that she came to know later on that fraud had been committed while getting partition suit dismissed as withdrawn. Hence, she was entitled to file application for restoration of the suit. [Para 7] [614-A-H; 615-A]

2. The contention that having regard to the

A circumstances emerging from the record of the case the trial court should not have restored the partition suit on file, is devoid of merits. What is important to notice is that on similar grounds, namely, fraud committed while getting LPA dismissed as withdrawn, the said LPA was B restored on file. It was held by the High Court that fraud was played upon the court while getting the LPA disposed of as withdrawn and, therefore, directions were given to the Registrar of the High Court to file criminal proceedings against two advocates and the appellant. C The appellant never challenged the said order at all. The whole order of restoration of LPA was challenged before this Court, by two advocates, but the said challenge failed when SLP filed by them was dismissed. The trial Court, while deciding the application for restoration of suit, D could not have afforded to ignore the findings recorded by the High Court while setting aside the order dismissing the LPA as withdrawn and the two orders passed by this Court. Once it was noticed by the trial court that LPA was restored on file on the ground that E signature of late father of the respondent No. 1 was forged, it was duty bound to follow the reasons given by the High Court for restoring LPA on file. [Para 8] [615-B-G]

3. The trial court restored the suit, which was got F dismissed as withdrawn by fraud. The argument that the trial court had acted with material irregularity while restoring the suit when two applications which were dismissed for default were also restored and, therefore, the Revision filed by the appellant should have been G allowed, is merely stated to be rejected. The supervisory jurisdiction of the High Court as incorporated in Section 115 CPC is intended to ensure that justice is done between the parties. The appellant who was beneficiary of fraud played upon the trial Court and the High Court would not be entitled to invoke discretionary jurisdiction H

of High Court under Section 115 CPC. Further in view of prayer made in the application, all the applications filed by the respondent No.1 were taken up for hearing together. [Para 9] [616-B-D]

4. The record of the case show that the suit, which was filed in the year 1955 for partition of the joint properties, was permitted to be withdrawn and dismissed on the basis of so called application for withdrawal filed by father of the respondent No. 1. Before dismissing the suit as withdrawn, trial court had not issued any notice to the deceased plaintiff or his heirs more particularly when the advocate, who filed the suit for partition in the year 1955, was substituted by another advocate without obtaining consent from the advocate who was earlier representing the deceased. No attempt was made by the trial court to verify as to what prompted the original plaintiff to withdraw the suit, more particularly, when order of the High Court remanding the matter to the trial court for fresh decision was subject-matter of LPA. On the facts of the case, a grave error was committed by the trial court by dismissing the suit for partition as withdrawn. In terms of order XXIII Rule 1 CPC, it is the privilege of the plaintiff alone to withdraw the plaint at any stage of the proceedings and the appellant being only one of the defendants having played the fraud in getting the suit dismissed as withdrawn, has no locus to object to the restoration of the suit. The late father of the respondent No. 1 did not claim any exclusive title to the properties in himself. He claimed partition of the properties as one of the joint owners. Initially, the suit was not only decreed in his favour but also in favour of the third brother. It is well settled that in a suit for partition of the joint properties every defendant is also in the capacity of the plaintiff and would be entitled to decree in his favour, if it is established that he has the share in the properties. Therefore, the suit for partition of the joint properties, filed by the late father of respondent No. 1, could not have

been dismissed as withdrawn without notice to another brother, who was also entitled to share in the properties. Taking over all view of the matter, no illegality or irregularity is committed by the High Court in dismissing the Revision Petition filed by the appellant. Therefore, no case is made out by the appellant to interfere with the order passed by the High Court. [Para 10] [616-F-H; 617-A-G]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8407 of 2009.

From the Judgment and Order dated 29.3.2007 of the High Court of Madhya Pradesh, Jabalpur, Bench at Gwalior in Civil Revision No. 122 of 2005.

Anoop G. Chaudhari, June Chaudhari, Prabhat Kumar Rai, Saud S.A. and Shakil Ahmed Syed for the Appellant.

Sunil Gupta, T.N. Singh, K.K. Mohan and V.K. Singh for the Respondents.

The Judgment of the Court was delivered by

J.M. PANCHAL, J. 1. Leave granted.

2. This appeal, by special leave, is directed against judgment dated March 29, 2007 rendered by the High Court of Madhya Pradesh, Jabalpur, Bench at Gwalior in Civil Revision No. 122 of 2005, by which order dated May 5, 2005, passed by the learned First Additional District Judge, Gwalior in MJC No. 3 of 2004 allowing the application filed by the respondent No. 1 under Order IX Rule 9 read with Section 151 of the Code of Civil Procedure is confirmed and order dated December 16, 2003 in MJC No.35 of 2001 (new number 29 of 2003) dismissing the said case for default as well as order dated August 23, 2001 dismissing MJC No. 25 of 1998 for default are set aside and Civil Suit No.3A of 1996, which was dismissed as withdrawn on February 28, 1997, is restored.

3. The relevant facts emerging from the record of the case are as under:

Late Mr. Shankar Lal, who was father of the respondent No. 1, filed Civil Suit No. 11 of 1955 for partition of the joint properties. The said suit was decreed on July 10, 1978. Feeling aggrieved, the appellant preferred First Appeal No. 60 of 1978 before the High Court. The learned single Judge of the High Court set aside the decree passed by the trial court and remanded the matter to the trial court for fresh decision vide order dated September 30, 1991. Against the order of remand, LPA No. 32 of 1991 was filed by father of the respondent No.1. On February 24, 1997 an application was filed by late Mr. Shankar Lal who was father of the respondent No.1 for withdrawal of LPA No.32 of 1991. The LPA was dismissed as withdrawn on the same date, i.e., February 24, 1997. In the year 1996 Civil Suit No. 11 of 1955 filed for partition of the joint properties was given new number as 3A of 1996. On February 28, 1997 another application was filed for withdrawal of Civil Suit No. 3A of 1996 by the father of the respondent No. 1. In view of the contents of the said application the Civil Suit was also dismissed as withdrawn on the same date, i.e., on February 28, 1997. On August 11, 1998, father of the respondent No. 1 expired. The respondent No.1 filed an application on September 2, 1998 for recalling the order dated February 24, 1997, passed in LPA No. 32 of 1991. There was delay in filing the application seeking recall of order dated February 24, 1997. Therefore, another application was filed for condonation of delay. The respondent No.1 alleged in her application that the application dated February 24, 1997, purportedly filed by her late father, for withdrawal of Letters Patent Appeal, in fact did not bear the signature of her father and, thus, signature of her father was forged. It was mentioned in the application that Mr. J.P. Sharma, advocate, had noted his appearance on behalf of her father in Civil Suit No. 3A of 1996 subsequently without seeking no objection certificate from the previous counsel, who had filed the plaint, and thereafter filed application for withdrawal of LPA, which was illegal and, therefore, the order dated February 24, 1997 disposing of the

A LPA as withdrawn should be recalled. The High Court heard the learned counsel for the parties and by order dated January 10, 2005 condoned the delay in filing the application seeking recall of order dated February 24, 1998 by which the LPA 32 of 1991 was dismissed as withdrawn and allowed the B application of respondent No. 1 for recalling order dated February 24, 1997. While allowing the application filed by respondent No. 1 the High Court observed that a fraud was played upon the Court and directed the Registrar of the Court to file a complaint against Advocate Mr. J.P. Sharma and also C against Advocate Mr. S.C. Goyal, who had identified the signature of late father of the respondent No. 1. The High Court also directed the Registrar to initiate criminal proceedings against the present appellant who was supposed to be the beneficiary of the act of forging for initiating criminal D proceedings by filing a complaint.

4. The two advocates, i.e., Mr. J.P. Sharma and Mr. S.C. Goyal challenged the order dated January 10, 2005 directing the Registrar of the High Court to file a complaint against them by filing Special Leave Petition No. 1546 of 2005 before this E Court. The said Special Leave Petition was dismissed on April 15, 2005 by this Court in the following terms: -

> "Permission to file SLP is granted. We see no reason to interfere. The Special Leave Petition is dismissed save and except we clarify that the observations of the High F Court shall not be taken into consideration in any proceedings."

Thus, the direction given by the High Court to initiate criminal proceedings against Mr. J.P. Sharma and Mr. S.C. Goyal was G upheld.

5. LPA No. 32 of 1991 was, therefore, posted for hearing on merits before the High Court. The High Court, by judgment dated August 17, 2005, dismissed the said appeal holding that the LPA was not maintainable. As the Division Bench of the

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High Court held that the LPA was not maintainable, the respondent No.1 filed Special Leave Petition No.24597 of 2005 in this Court challenging the validity of the judgment dated September 30, 1991, rendered by the learned Single Judge of the High Court in First Appeal No. 60 of 1978 remanding the matter to the trial court for fresh decision. This Court, vide order dated November 21, 2005, condoned the delay caused in filing the S.L.P. and dismissed the Special Leave Petition. This Court also directed expeditious disposal of the suit. Thus order of remand dated September 30, 1991 was upheld by this Court.

6. The respondent No. 1 had filed an application on September 17, 1998 for restoration of Civil Suit No. 3A of 1996, which was dismissed as withdrawn on 6 February 28, 1997. On August 23, 2001 the said application for restoration was dismissed for default. Therefore, the respondent No. 1 filed an application for setting aside the order dated August 23, 2001 and for restoration of the application seeking restoration of the Civil Suit No. 3A of 1996. The subsequent application was also dismissed for default on December 16, 2003. The respondent No. 1, therefore, filed another application on February 10, 2004 under Order IX Rule 9 read with Section 151 of the Code of Civil Procedure for setting aside the order dated December 16, 2003. On January 18, 2005 the respondent No. 1 filed an application for restoration of Civil Suit No. 3A of 1996 contending that by order dated January 10, 2005 the Division Bench of the High Court has held that signature of late Mr. Shankar Lal was forged when application for withdrawal of LPA was presented before the Court and, therefore, in view of finding of the High Court, the order dismissing the suit as withdrawn should also be set aside. The trial court by order dated May 5, 2005 allowed the application of the respondent No. 1 for restoration of Civil Suit No. 3A of 1996. The appellant, therefore, filed Civil Revision No. 122 of 2005 before the High Court. The High Court of Madhya Pradesh, Jabalpur, Bench at Gwalior dismissed the same by judgment dated March 29, 2007 giving rise to the instant appeal.

A 7. This Court has heard the learned counsel for the parties at length and considered the record of the case. The argument that the respondent No. 1 was not entitled to file application for restoration of the suit filed by her late father, as right to sue did not survive in favour of the respondent No. 1 has no merit. It is B well settled that where the right to sue is personal to the deceased, the same does not survive for the benefit of his legal representatives. There is no manner of doubt that late father of the respondent No. 1 had filed suit for partition of the joint properties. On his death right to sue survived and the C respondent No. 1 being his daughter and legal representative was entitled to continue the suit in view of the provisions of Hindu Succession Act. The deceased who was a male Hindu, claimed interest in the joint properties which are subject matter of suit for partition. The record does not indicate that he had D executed a Will though the appellant claimed that he had executed a Will in favour of Vijai Kumar. It may be mentioned that the said Vijai Kumar has not applied for being impleaded as a party to the proceedings nor claimed interest in the properties of the deceased. He, having died intestate, his share in the joint properties shall devolve by intestate succession as E provided by Section 6 of the Hindu Succession Act, 1956. Section 8 of the said Act which deals with general rules of succession in the case of males, inter alia, provides that the property of a male Hindu dying intestate shall devolve firstly upon the heirs, being relatives specified in Class I of the F Schedule to the Act. A daughter is specified as one of the relatives in Class I of the Schedule. Therefore, there is no manner of doubt that the share of the deceased plaintiff in the suit properties would devolve upon her, if suit for partition is decreed. Rule 3 of Order XXII CPC, inter alia, stipulates that G when a sole plaintiff dies and the right to sue survives, the Court on an application made in that behalf, should cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit. Thus, the respondent No.1 was entitled to be substituted in place of her deceased father. The H record shows that she came to know later on that fraud had

been committed while getting Civil Suit No. 3A of 1996 dismissed as withdrawn. Hence, she was entitled to file application for restoration of the suit. Thus, it is not correct to argue that the respondent No. 1 was not entitled to file application for restoration of the suit filed by her father for partition of the joint properties.

8. The contention that having regard to the circumstances emerging from the record of the case the trial court should not have restored the Civil Suit No. 3A of 1996 on file, is devoid of merits. What is important to notice is that on similar grounds, namely, fraud committed while getting LPA No. 32 of 1991 dismissed as withdrawn, the said LPA was restored on file. As mentioned earlier it was held by the High Court that fraud was played upon the court while getting the LPA disposed of as withdrawn and, therefore, directions were given to the Registrar of the High Court to file criminal proceedings against two advocates and the appellant. The appellant never challenged the said order at all. The whole order of restoration of LPA was challenged before this Court, by two advocates, but the said challenge failed when SLP No.1546 of 2005 filed by them was dismissed by this Court on April 15, 2005. Further this Court by order dated November 11, 2005 passed in SLP No.24597 of 2008 expedited the trial at the time of upholding the order of remand. The Trial Court, while deciding the application for restoration of suit, could not have afforded to ignore the findings recorded by the High Court while setting aside the order dismissing the LPA No. 32 of 1991 as withdrawn and the two orders passed by this Court. Once it was noticed by the trial court that LPA No. 32 of 1991 was restored on file on the ground that signature of late father of the respondent No. 1 was forged, it was duty bound to follow the reasons given by the High Court for restoring LPA No. 32 of 1991 on file. This Court notices that in MJC No. 3 of 2004 the respondent No. 1 had prayed for setting aside the order dated December 16, 2003 by which MJC No. 29 of 2003 was dismissed, but the learned Judge of trial court while setting aside the order dated December 16, 2003 also restored MJC No. 25 of 1998

A because an application was filed praying to decide all the MJCs together.

9. By restoration of MJC No. 25 of 1998 and MJC No. 35 of 1998 (29 of 2003), no substantive right of the appellant is decided by the trial court. What is done is to restore the suit, B which was got dismissed as withdrawn by fraud. The argument that the Trial Court had acted with material irregularity while restoring the suit when two applications which were dismissed for default were also restored and, therefore, the Revision filed by the appellant should have been allowed, is merely stated to C be rejected. The supervisory jurisdiction of the High Court as incorporated in Section 115 of the Code of Civil Procedure is intended to ensure that justice is done between the parties. The appellant who was beneficiary of fraud played upon the Trial Court and the High Court would not be entitled to invoke D discretionary jurisdiction of High Court under Section 115 CPC. Further in view of prayer made in the application, all the applications filed by the respondent No.1 were taken up for hearing together. Under the circumstances, this Court is of the firm opinion that the High Court was justified in not interfering E with the order by which MJC No. 25 of 1998 and MJC No. 35 of 1998 were also restored while allowing MJC No. 3 of 2004 filed by the respondent No. 1 for setting aside order dated December 16, 2003 by which MJC NO. 29 of 2003 was dismissed for default

F 10. From the record of the case this Court finds that the suit, which was filed in the year 1955 for partition of the joint properties, was permitted to be withdrawn and dismissed on February 28, 1997 on the basis of so called application for withdrawal filed by father of the respondent No. 1. Before G dismissing the suit as withdrawn, the trial court had not issued any notice to the deceased plaintiff or his heirs more particularly when the learned advocate, who had filed the suit for partition in the year 1955, was substituted by another advocate without obtaining consent from the advocate who was earlier H representing the deceased. No attempt was made by the trial

court to verify as to what prompted the original plaintiff to withdraw the suit, more particularly, when order dated September 30, 1991 rendered by the learned Single Judge of the High Court remanding the matter to the trial court for fresh decision was subject-matter of LPA No. 32 of 1991. On the facts of the case, this Court finds that a grave error was committed by the trial court by dismissing the suit for partition as withdrawn. In terms of order XXIII Rule 1 of the Code of Civil Procedure, it is the privilege of the plaintiff alone to withdraw the plaint at any stage of the proceedings and the appellant being only one of the defendants having played the fraud in getting the suit dismissed as withdrawn, has no locus to object to the restoration of the suit. What is relevant to notice is that the late father of the respondent No. 1 did not claim any exclusive title to the properties in himself. He claimed partition of the properties as one of the joint owners. Initially, the suit was not only decreed in his favour but also in favour of the third brother. It is well settled that in a suit for partition of the joint properties every defendant is also in the capacity of the plaintiff and would be entitled to decree in his favour, if it is established that he has the share in the properties. Therefore, the suit for partition of the joint properties, filed by the late father of respondent No. 1, could not have been dismissed as withdrawn without notice to another brother, who was also entitled to share in the properties. Taking over all view of the matter, this Court finds that no illegality or irregularity is committed by the High Court in dismissing the Revision Petition filed by the appellant. The High Court has confirmed the order of the learned Additional District Judge, Gwalior, by which substantial justice is done to the parties. Therefore, no case is made out by the appellant to interfere with the order passed by the High Court and, thus, the instant appeal is liable to be dismissed.

11. For the foregoing reasons the appeal fails and is dismissed. There shall be no order as to costs.

D.G. Appeal dismissed.