GURNAM SINGH (D) THR. LRS. A

v.

GURBACHAN KAUR (D) BY LRS. & ORS.

(Civil Appeal No. 5671 of 2017)

APRIL 27, 2017 B

[R. K. AGRAWAL AND ABHAY MANOHAR SAPRE, JJ.]

Code of Civil Procedure, 1908 – Or. XXII, rr. 3 and 4 – Application under – On facts, appellant and two respondents expired during the pendency of the second appeal – No steps taken by any of the legal representatives of the deceased on whom the right to sue devolved, to file an application u/Or. XXII, rr. 3 and 4 for bringing their names on record to enable them to continue the lis *– However, the High Court decreed the suit for specific performance of contract filed by the plaintiff-respondent against the appellant in relation to the suit land – On appeal, held: Decree passed by a court for or against a dead person is a nullity – Thus, the impugned judgment is a nullity because it was passed by the High Court in favour of and also against the dead persons – Non-compliance of rr. 3(2) and 4(3) of Or. XXII resulted in dismissal of second appeal as abated on the expiry of 90 days – High Court ceased to have jurisdiction to decide the second appeal which stood already dismissed beyond the statutory period of 90 days and there was no pending appeal on and thereafter – Further, no applications were filed to revive the appeal for hearing – Thus, the judgment is set aside.* C D E

Allowing the appeal, the Court F

HELD: 1.1 It is a settled principle of law that the decree passed by a Court for or against a dead person is a "nullity". The impugned judgment is a nullity because it was passed by the High Court in favour of and also against the dead persons. [Paras 16, 22][906-A-B; 907-H] G

Kiran Singh & Ors. v. Chaman Paswan & Ors. **AIR 1954 SC 340 : [1955] SCR 117;** *N. Jayaram Reddy & Anr. v. Revenue Divisional Officer & Land Acquisition Officer, Kurnool* **(1979) 3 SCC 578 : [1979] 3 SCR 599;** *Ashok Transport Agency v. Awadhesh Kumar &* H

A *Anr.* [1998] 5 SCC 567; *Amba Bai & Ors. v. Gopal & Ors.* (2001) 5 SCC 570 – relied on.

1.2 On the death of a party to the appeal, if no application is made by the party concerned to the appeal or by the legal representatives of the deceased on whom the right to sue has B **devolved for substitution of their names in place of the deceased party within 90 days from the date of death of the party, such appeal abates automatically on expiry of 90 days from the date of death of the party. In other words, on 91st day, there is no appeal pending before the Court. It is "dismissed as abated". [Para** C **18][906-D-E]**

1.3 Order XXII Rule 3(2) applies in the case of the death of plaintiff/appellant and Order XXII Rule 4(3) which applies in the case of defendant/respondent provides the consequences for not filing the application for substitution of legal representatives by the parties concerned within the time prescribed. In the instant D **case, Order XXII, r. 3(2), 4(3) came in operation because the appellant and the two respondents expired during the pendency of second appeal and no steps were taken by any of the legal representatives representing the dead persons and on whom the right to sue had devolved to file an application under Order XXII** E **Rules 3 and 4 CPC for bringing their names on record in place of the dead persons to enable them to continue the lis. The legal effect of the non-compliance of Rules 3(2) and 4(3) of Order XXII, therefore, came into operation resulting in dismissal of second appeal as abated on the expiry of 90 days from 10.05.1994, i.e., on 10.08.1994. The High Court, therefore, ceased to have** F **jurisdiction to decide the second appeal which stood already dismissed on 10.08.1994. Indeed, there was no pending appeal on and after 10.08.1994. [Paras 17, 19, 20][906-E-F; 907-A-C]**

1.4 The appeal could be revived for hearing only when firstly, the proposed legal representatives of the deceased persons had G **filed an application for substitution of their names and secondly, they had applied for setting aside of the abatement under Order XXII Rule 9 and making out therein a sufficient cause for setting aside of an abatement and lastly, had filed an application under Section 5 of the Limitation Act seeking condonation of delay in** H **filing the substitution application under Order XXII Rules 3 and**

4 beyond the statutory period of 90 days. If these applications had been allowed by the High Court, the second appeal could have been revived for final hearing but not otherwise. Such was not the case here because no such applications had been filed. [Para 21][907-C-E]

1.5 The appellants are the legal representatives of defendant Nos. 2 and 4 on whom the right to sue has devolved. They had, therefore, right to question the legality of the impugned order *inter alia* on the ground of it being a nullity. Such objection, could be raised in appeal or even in execution proceedings arising out of such decree. The objection, therefore, is upheld. The impugned judgment/decree is set aside. [Para 23][908-A-B]

Case Law Reference

[1955] SCR 117	**relied on**	**Para 15**
[1979] 3 SCR 599	**relied on**	**Para 22**
(1998) 5 SCC 567	**relied on**	**Para 22**
(2001) 5 SCC 570	**relied on**	**Para 22**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 5671 of 2017.

From the Order dated 18.05.2010 of the High Court of Punjab and Haryana at Chandigarh in RSA No. 1148 of 1985.

Basava Prabhu S. Patil, Sr. Adv., Sanjay Sarin, Vivek Salathia, Ms. Pratikasha Sharma and Dinkar Kalra, Advs. for the Appellants.

Subhasish Bhowmick, Adv. for the Respondents.

The Judgment of the Court was delivered by

ABHAY MANOHAR SAPRE, J. 1. Leave granted.

2. This appeal is filed by the legal representatives of defendant Nos. 2 and 4 against the final judgment and order dated 18.05.2012 passed by the High Court of Punjab and Haryana at Chandigarh in Civil Regular Second Appeal No. 1148 of 1985 whereby the High Court allowed the plaintiff's appeal, set aside the concurrent findings of the Trial Court and the First Appellate Court and decreed the plaintiff's suit for specific performance of contract against the defendants in relation to the suit land.

3. The facts of the case lie in a narrow compass so also the

A controversy involved in the appeal is short. However, only relevant facts to appreciate the question involved are mentioned infra.

4. One Surjan Singh(defendant No.1) was the original owner of the suit land bearing Khasra Nos. 1806, 1807, 1808 and 1809 (new numbers 91R/2/3, 12, 9, 10, 11, 90R/6 and 15) measuring 43 Kanals 4 Marlas B situated in village Rasulpur, Tahsil/District Amritsar (hereinafter referred to as "the suit land").

5. On 06.05.1974, Surjan Singh entered into a contract to sell the suit land to one Gurbachan Kaur(plaintiff) for Rs.10,000/- per Killa. In terms of the contract, the sale deed of the suit land was to be executed C by Surjan Singh in favour of Gurbachan Kaur on or before 28.01.1975.

6. On 03.09.1974, Surjan Singh sold the suit land to Joginder Singh, Mehal Singh and Gurnam Singh. This led to filing of the civil suit by Gurbachan Kaur against Surjan Singh(defendant No.1) and subsequent purchasers, namely, Joginder Singh(defendant No.2), Mehal D Singh(defendant No.3) and Gurnam Singh(defendant No.4). The suit was for specific performance of contract dated 06.05.1974 filed by Gurbachan Kaur against the aforementioned 4 defendants in relation to the suit land. The defendants contested the suit. Parties went on trial.

7. By judgment/decree dated 29.08.1980, the Trial Court dismissed E the suit insofar as it pertained to grant of relief of specific performance of contract was concerned but decreed the suit by granting money decree for Rs.7000/- in plaintiff's favour. In this way, the suit was partly decreed and partly dismissed.

8. Felt aggrieved, the plaintiff-Gurbachan Kaur alone filed the F first appeal in the Court of District Judge. So far as the defendants are concerned, they did not file any appeal against the money decree suffered by them. By judgment/decree dated 06.11.1984, the first Appellate Court dismissed the appeal filed by the plaintiff and affirmed the judgment/ decree of the Trial Court.

G 9. Felt aggrieved, the plaintiff- Gurbachan Kaur carried the matter further and filed Second Appeal before the High Court. The appeal was admitted for final hearing on substantial questions of law framed by the High Court.

10. During pendency of the second appeal, Gurbachan Kaur- H appellant(plaintiff) died on 10.05.1994. Likewise, Joginder Singh

(respondent- defendant No.2) died on 06.12.2000 and lastly Gurnam Singh(respondent-defendant No.4) also died on 19.04.2002. Despite bringing to the notice of the High Court about the death of the appellant and the two respondents, no steps were taken by anyone to bring their legal representatives on record to enable them to prosecute the *lis* involved in the appeal.

11. On 18.05.2010, the High Court allowed the second appeal, set aside the judgment/decree of the two Courts below and decreed the plaintiff's suit for specific performance of the contract against the defendants in relation to the suit land.

12. It is against this judgment of the High Court, the legal representatives of defendant No.2(Late Joginder Singh) and defendant No.4(Late Gurnam Singh) filed the present appeal by way of special leave petition and sought permission to question its legality and correctness.

13. Heard Mr. Basava Prabhu S. Patil, learned senior counsel for the appellants and Mr. Subhasish Bhowmick, learned counsel for the respondents.

14. The short question, which arises for consideration in this appeal, is whether the impugned order allowing the plaintiff's second appeal is legally sustainable in law? In other words, the question is whether the High Court had the jurisdiction to decide the second appeal when the appellant and 2 respondents had expired during the pendency of appeal and their legal representatives were not brought on record?

15. In a leading case of this Court in **Kiran Singh & Others** vs. **Chaman Paswan & Others** (AIR 1954 SC 340), the learned Judge Venkatarama Ayyar speaking for the Bench in his distinctive style of writing laid down the following principle of law being fundamental in nature:

> **"It is a fundamental principle that a decree passed by a Court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the**

very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties."

16. The question, therefore, is whether the impugned judgment/order is a nullity because it was passed by the High Court in favour of and also against the dead persons. In our considered opinion, it is a nullity. The reasons are not far to seek.

17. It is not in dispute that the appellant and the two respondents expired during the pendency of the second appeal. It is also not in dispute that no steps were taken by any of the legal representatives representing the dead persons and on whom the right to sue had devolved to file an application under Order 22 Rules 3 and 4 of the Code of Civil Procedure, 1908 (for short, 'the Code') for bringing their names on record in place of the dead persons to enable them to continue the *lis*.

18. The law on the point is well settled. On the death of a party to the appeal, if no application is made by the party concerned to the appeal or by the legal representatives of the deceased on whom the right to sue has devolved for substitution of their names in place of the deceased party within 90 days from the date of death of the party, such appeal abates automatically on expiry of 90 days from the date of death of the party. In other words, on 91st day, there is no appeal pending before the Court. It is "dismissed as abated".

19. Order 22 Rule 3(2) which applies in the case of the death of plaintiff/appellant and Order 22 Rule 4(3) which applies in the case of defendant/respondent provides the consequences for not filing the application for substitution of legal representatives by the parties concerned within the time prescribed. These provisions read as under:-

Order 22 Rule 3(2)

"Where within the time limited by law no application is made under sub-rule (1) the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff."

Order 22 Rule 4(3)

"Where within the time limited by law no application is made

under sub-rule (1), the suit shall abate as against the deceased defendant."

20. In the case at hand, both the aforementioned provisions came in operation because the appellant and the two respondents expired during the pendency of second appeal and no application was filed to bring their legal representatives on record. As held above, the legal effect of the non-compliance of Rules 3(2) and 4(3) of Order 22, therefore, came into operation resulting in dismissal of second appeal as abated on the expiry of 90 days from 10.05.1994, i.e., on 10.08.1994. The High Court, therefore, ceased to have jurisdiction to decide the second appeal which stood already dismissed on 10.08.1994. Indeed, there was no pending appeal on and after 10.08.1994.

21. In our considered view, the appeal could be revived for hearing only when firstly, the proposed legal representatives of the deceased persons had filed an application for substitution of their names and secondly, they had applied for setting aside of the abatement under Order 22 Rule 9 of the Code and making out therein a sufficient cause for setting aside of an abatement and lastly, had filed an application under Section 5 of the Limitation Act seeking condonation of delay in filing the substitution application under Order 22 Rules 3 and 4 of the Code beyond the statutory period of 90 days. If these applications had been allowed by the High Court, the second appeal could have been revived for final hearing but not otherwise. Such was not the case here because no such applications had been filed.

22. It is a fundamental principle of law laid down by this Court in **Kiran Singh's case** (supra) that a decree passed by the Court, if it is a nullity, its validity can be questioned in any proceeding including in execution proceedings or even in collateral proceedings whenever such decree is sought to be enforced by the decree holder. The reason is that the defect of this nature affects the very authority of the Court in passing such decree and goes to the root of the case. This principle, in our considered opinion, squarely applies to this case because it is a settled principle of law that the decree passed by a Court for or against a dead person is a "nullity" **(See-N. Jayaram Reddy & Anr. Vs. Revenue Divisional Officer & Land Acquisition Officer, Kurnool,** (1979) 3 SCC 578, **Ashok Transport Agency vs. Awadhesh Kumar & Anr.,** (1998) 5 SCC 567 and **Amba Bai & Ors. Vs. Gopal & Ors.,** (2001) 5 SCC 570).

A 23. The appellants are the legal representatives of defendant Nos. 2 and 4 on whom the right to sue has devolved. They had, therefore, right to question the legality of the impugned order *inter alia* on the ground of it being a nullity. Such objection, in our opinion, could be raised in appeal or even in execution proceedings arising out of such decree. In our view, the objection, therefore, deserves to be upheld. It B is, accordingly, upheld.

24. In the light of foregoing discussion, we allow the appeal and set aside the impugned judgment/decree.

Nidhi Jain Appeal allowed.