

BANWARI LAL (D) BY LRS. & ANR.

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v.

BALBIR SINGH

(Civil Appeal No. 6567 of 2015)

AUGUST 25, 2015

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[T. S. THAKUR AND R. BANUMATHI, JJ.]

Code of Civil Procedure, 1908 – Or. XXII, – Manner in which the legal representatives of plaintiffs or defendants ought to be brought on record – Held: Rules of procedure under Order XXII CPC are designed to advance justice and should be so interpreted as not to make them penal statutes for punishing erring parties – On sufficient cause, delay in bringing the legal representatives of the deceased party on record should be condoned – Procedure is meant only to facilitate the administration of justice and not to defeat the same.

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Sardar Amarjit Singh Kalra v. Pramod Gupta (2003) 3 SCC 272 : 2002 (5) Suppl. SCR 350; Sital Prasad Saxena (D) by Lrs. v. Union of India and Ors. (1985) 1 SCC 163 : 1985 (1) SCR 659 – relied on.

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Case Law Reference

2002 (5) Suppl. SCR 350 relied on **Para 10**

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1985 (1) SCR 659 relied on **Para 11**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 6567 of 2015.

From the Judgment and Order dated 15.03.2013 of the High Court of Delhi at New Delhi in RSA No. 100 of 2008.

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A. Sharan, Sr. Adv., Viresh B. Saharya and Akshat Agarwal, Advs. for the Appellants.

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A R. Venkataramani, Sr. Adv., Santosh Kumar, Bundela,
Mushtaq Ahmad, Advs. for the Respondent.

The Judgment of the Court was delivered by

R. BANUMATHI, J. 1. Leave granted.

B 2. This appeal arises out of the order dated 15.03.2013
passed by the High Court of Delhi dismissing the second
appeal being RSA No.100 of 2008 as abated and also the
interlocutory applications being CM Nos.6342/2008, 11811-
11813/2009 and 1998/2012 to bring on record the legal
C representatives of the appellants herein.

3. Respondent-Balbir Singh filed a suit bearing No.369/
1986 against one Banwari Lal and Swaraj for declaration and
permanent injunction. Case of respondent-plaintiff is that he is
D the owner of parcel of land measuring 600 sq. yards, bearing
plot Nos. 5, 6 and 7 out of Rect. No.42, Kila No.5/1 situated in
the area of village Karawal Nagar, Delhi in the abadi of Prem
Nagar Extn. Ilaqua Shahara, Delhi. The aforesaid parcel of
land is also claimed by late Banwari Lal contending that the
E land was purchased by him on 25.09.1985 from one Premlata
and her husband Chander Prakash. The trial court initially
dismissed the suit vide judgment dated 13.02.1997. In the
appeal, the first appellate court set aside the judgment and
decree passed by the trial court and the matter was remanded
back to the trial court to decide the matter afresh. Trial court
F considered the entire matter afresh and again dismissed the
suit bearing No.276/2004 of the respondent/Balbir Singh vide
judgment dated 23.09.2005. Respondent/Balbir Singh again
feeling aggrieved, preferred a fresh appeal bearing RCA
No.226/2005 against the said judgment and the decree. First
G appellate court by judgment dated 04.02.2008 set aside the
judgment and decree passed by the trial court and allowed
the appeal of Balbir Singh. During the pendency of the first
appeal, defendant-Banwari Lal died on 30.01.2006 that is
almost two years prior to the date of judgment of the first

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appellate court. Even though Banwari Lal has expired on 30.01.2006, no steps were taken to bring on record the legal representatives of late Banwari Lal. A

4. Being aggrieved by the judgment of the first appellate court, Banwari Lal represented by his legal representatives and the second appellant-Swaraj filed second appeal before the High Court of Delhi. During the pendency of the second appeal, appellant No.2-Swaraj also died on 02.12.2008. B

5. Second Appeal itself was dismissed for non prosecution on 02.08.2010. Two applications were filed bearing CM Nos.17569-17570/2010 for restoration and condonation of delay. On the basis of the said applications, the High Court had passed an order on 02.02.2012 restoring the second appeal to its original number. After restoration, the second appeal was dismissed by the High Court on the following grounds:- C D

(i). The appellants have not taken steps to bring on record the legal representatives of Banwari Lal either in the first appeal or at the time when the second appeal was filed. Second appeal was purportedly filed on behalf of the legal heirs of late Banwari Lal without there being any affidavit or Vakalatnama signed by any of them or no application under Order XXII Rule 3 CPC has been filed along with the appeal. The proceedings against Banwari Lal had abated even during the pendency of the first appeal itself and it was improper on the part of the appellants to have mentioned the names of legal heirs of Banwari Lal in the memo of second appeal. E F

(ii). Second appellant-Swaraj also died on 02.12.2008 and an order was passed on 06.08.2009 that the second appeal abated qua the second appellant as no steps were taken to bring on record his legal representatives. G

6. Second appellant-Swaraj died on 02.12.2008. CM Nos.7034 of 2009 (under Order XXII Rule 9 CPC) and 7035 H

- A of 2009 (under Order XXII Rule 3 CPC) in RSA No.100/2008 were filed to set aside the abatement against appellant No.2 and also to bring on record the legal representatives of the second appellant. Since application for condonation of delay in filing the applications was not filed, those applications were
- B withdrawn with liberty to file a fresh application. Since fresh applications were not filed to bring on record the legal representatives of the second appellant, the second appeal was dismissed qua the second appellant by order dated 06.08.2009. It is clear from the combined reading of Order
- C XXII Rules 3, 4 and 11 CPC that the doctrine of abatement is applicable equally to a suit as well as to an appeal. It is seen from the records that fresh applications viz. 11811/2009 (for condonation of delay), 11812/2009 (under Order XXII Rule 9 CPC) and 11813/2009 (under Order XXII Rule 3 CPC) were
- D filed to set aside the abatement caused due to the death of the second appellant-Swaraj. As noticed earlier, second appeal being RSA No.100/2008 was dismissed for non prosecution on 02.08.2010. By order dated 02.02.2012, the second appeal was restored to file on payment of cost of Rs.5,000/-. The relevant portion of the order reads as under:-
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“....In view of the reasoning given, the order dated 02.08.2010 is recalled subject to costs of Rs.5000/- . The application stands disposed of.

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RSA 100/2008 and CM 6342/2008 (for stay), 11811/2009 (for delay), 11812/2009 (u/o 22 R 9 CPC) and 11813/2009 (u/o 22 R 3 CPC)

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Since the appeal has been revived, the interim order dated 01.05.2008 also stands revived.”

- H It appears, even though second appeal was restored, no specific order was passed to restore the applications CM No.11811/2009, 11812/2009 and 11813/2009.

7. But the facts remain that three fresh applications A
No.11811/2009, 11812/2009 (under Order XXII Rule 9 CPC) and 11813/2009 (under Order XXII Rule 3 CPC) were filed for condonation of delay and to set aside the abatement and to bring on record the legal representatives of appellant No.2-Swaraj. When the second appeal was restored to file, specific B
order ought to have been passed restoring the above three applications and setting aside the abatement and the legal representatives of the appellant No.2 ought to have been brought on record. Without passing specific order on those C
three applications, High Court was not right in dismissing the second appeal as abated qua the second appellant.

8. In so far as the first appellant late Banwari Lal, he died on 30.01.2006 during the pendency of the first appeal and in the first appellate court no steps were taken to bring on record the legal representatives of late Banwari Lal. In the first appeal, D
respondent-Balbir Singh was the appellant and it was his responsibility to bring on record the legal representatives of late Banwari Lal. When the second appeal was filed, memo of appeal contained the names of legal representatives of late Banwari Lal. It may be that legal representatives have not E
signed memo of appeal. In the first appeal, if the legal representatives of Banwari Lal were brought on record, the cause title in the decree of the first appellate court would have carried the names of legal heirs of late Banwari Lal. There would have been discrepancy between the decree of the first F
appellate court and the memo of the second appeal. When the second appeal was filed, the High Court Registry should have checked up the names of the parties as occurred in the decree of the courts below and the memo of second appeal and the defects should have been pointed out at that time. But G
that was not to be so.

9. Since no steps were taken to bring on record the legal representatives of late Banwari Lal either in the first appeal or in the second appeal, the appellants have filed CM No. 1998/ H

- A 2012 (under Order I Rule 10 CPC read with Section 151 CPC) to implead (i) Shakuntala (ii) Gaurav (iii) Rachna and (iv) Manju. Civil Procedure Code Order XXII stipulates the manner in which the legal representatives of plaintiffs or defendants ought to be brought on record. The prescribed procedure cannot be circumvented by filing application under Order I Rule 10 CPC read with Section 151 CPC. However, in our view, it would be unjust to non-suit the appellants on the ground of technicalities.

10. Provisions of Order XXII CPC are not penal in nature. It is a rule of procedure and substantial rights of the parties cannot be defeated by pedantic approach by observing strict adherence to the procedural aspects of law. In *Sardar Amarjit Singh Kalra v. Pramod Gupta*, (2003) 3 SCC 272, a Five Judge Bench of this Court held as under:-

D “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

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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..." (Underlining added)

11. In *Sital Prasad Saxena (D) by Lrs. v. Union of India and Ors.*, (1985) 1 SCC 163, it was observed that the rules of procedure under Order XXII CPC are designed to advance justice and should be so interpreted as not to make them penal statutes for punishing erring parties. On sufficient cause, delay in bringing the legal representatives of the deceased party on record should be condoned. Procedure is meant only to facilitate the administration of justice and not to defeat the same. The dismissal of the second appeal by the High Court does not constitute a sound and reasonable exercise of its powers and the impugned order cannot be sustained.

12. In the result, the impugned order is set aside and this appeal is allowed and the following directions are issued:-

A (i). Necessary applications were filed to bring on record the legal representatives of appellant No.2-Swaraj. Since the suit is of the year 1986 and the second appeal is of the year 2008 and in the interest of justice, the applications No. 6342/2008 (for stay), 11811/2009 (for condonation of delay), 11812/2009 (under Order XXII Rule 9 CPC) and 11813/2009 (under Order XXII Rule 3 CPC) are allowed and legal representatives of appellant No.2-Swaraj are ordered to be brought on record.

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C (ii). CM No.1998/2012 filed under Order 1 Rule 10 CPC is treated as an application under Order XXII Rule 3 CPC. The legal representatives of late Banwari Lal viz., (i) Shakuntala (ii) Gaurav (iii) Rachna and (iv) Manju are ordered to be brought on record and the application is allowed.

D (iii). RSA No.100/2008 on the file of the High Court is ordered to be restored. Memorandum of second appeal be suitably amended and amended memo of appeal shall be filed before the High Court within four weeks. The High Court shall afford sufficient opportunity of hearing to both parties and shall dispose of the second appeal in accordance with law as expeditiously as possible.

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F In the facts and circumstances of the case, we make no order as to costs.