Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4923 OF 2011
[Arising out of SLP [C] No.15113 of 2008]

Mangluram Dewangan … Appellant

Vs.

Surendra Singh & Ors. … Respondents

J U D G M E N T

R.V.RAVEENDRAN, J.

Leave granted.

2. One Prannath filed a suit against the respondents for declaration, possession and damages on 4.8.1989 in regard to an immovable property. Prannath died on 12.11.1994 during the pendency of the suit. The appellant filed an application under Order 22 Rule 3 of the Code of Civil Procedure ('Code' for short) on 27.1.1995 to be added and substituted as the legal representative of Prannath, claiming that he was the sole legatee under the registered will dated 10.10.1994 executed by Prannath. The said application was contested by the respondents-defendants. They denied the allegation

that deceased plaintiff Prannath had executed any will in favour of the appellant. They contended that the appellant was not the legal heir nor legatee of Prannath and therefore not entitled to be added as a party, as the legal representative of the deceased plaintiff. In view of the contest to the application, the appellant examined one Balwant who was an attesting witness to the will. After considering the documentary and oral evidence, the trial court (IV Civil Judge, Class II, Bilaspur) made an order dated 31.8.1996, holding that there was no acceptable evidence to prove the will and therefore the appellant could not be held to be the legal representative of the plaintiff. The trial court held that the application by the appellant under Order 22 Rule 3 of the Code could not be entertained or accepted and consequently in the absence of any legal heir of the plaintiff dismissed the suit.

2. Feeling aggrieved the appellant filed an appeal in the court of the V Additional District Judge, Bilaspur. The appellate court allowed the appeal by order dated 28.1.1998. It held that the registered will was proved by examining one of the attesting witnesses; that deceased Prannath himself had submitted an application in court in the pending suit on 25.10.1994 referring to the execution of his will dated 10.10.1994 and praying that his evidence

may be recorded without delay; and that therefore the appellant was entitled to be impleaded as the legal representative of the deceased plaintiff. The appellate court rejected the contention of the respondents-defendants that the appeal was not maintainable. It held that the order of the trial court dismissing the suit as a consequence of the rejection of the application under Order 22 Rule 3 of the Code would fall within the definition of "decree" under section 2(2) of the Code. The appellate court therefore set aside the order dated 31.8.1996 passed by the trial court, permitted the appellant to be brought on record and continue the suit as legal representative of the plaintiff and remanded the suit to trial court under Order 41 Rule 23 of the Code for deciding the matter on merits.

3. Respondents 1 and 2 filed a miscellaneous appeal before the High Court, under Order 43 Rule 1(u) of the Code against the said appellate judgment. A learned Single Judge of the Chhattisgarh High Court, by the impugned order dated 15.4.2008 allowed the said appeal and set aside the order dated 28.1.1998 passed by the appellate court and restored the order dated 31.8.1996 passed by the trial court. The High Court held that the order dated 31.8.1996 of the trial court did not amount to a decree and therefore the appeal by the appellant before the appellate court was not maintainable. The High Court held that an order can be a "decree" if it conclusively

determined the rights of parties, with regard to all or any of the matters in controversy in the suit. The question whether Prannath executed a will in favour of appellant and thus appellant was a legal representative of Prannath was not an issue in controversy in the suit, but arose incidentally for determination in view of the application of appellant for being brought on record as the legal representative of Prannath. An order on such an application did not decide all or any of the matters in controversy in the suit and not a 'decree' as defined under Order 2(2), and therefore, only a revision would be a remedy against such an order and not an appeal. The High Court after holding that the appeal was not maintainable also considered the matter on merits and held that the trial court was justified in dismissing the application under Order 22 Rule 3 of the Code by holding that the will was not proved.

4. The said order of the High Court is challenged in this appeal by special leave. The following questions arise for consideration on the contentions urged :

(i) Whether an order of the trial court rejecting an application filed under Order 22 Rule 3 of the Code, by a person claiming to be the legatee under the will of the plaintiff and consequently dismissing the suit in the absence of any legal heir, is an appealable decree?

(ii) Whether the High Court was justified in upholding the decision of the trial court that the will was not proved and rejecting the application under Order 22 Rule 3 of the Code?

Re : Question (i)

5. Order 22 deals with death of parties. Rules 1, 3, 5 and 9 of order 22 of the Code have a bearing on the issue and relevant portions thereof are extracted below :

> "1. **No abatement by party's death if right to sue survives.**—The death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives.
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> 3. **Procedure in case of death of one of several plaintiffs or of sole plaintiff.**—(1) **Where** one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or **a sole plaintiff** or sole surviving plaintiff **dies and the right to the sue survives**, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.
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> (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.
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> 5. **Determination of question as to legal representative.**—Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, *such question shall be determined by the Court:* x x x x x
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> 9. **Effect of abatement or dismissal.**—(1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.
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> (2) The plaintiff or *the person claiming to be the legal representative of a deceased plaintiff* or the assignee or the receiver in the case of an insolvent

> plaintiff *may apply for an order to set aside the abatement or dismissal;* and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit".
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> x x x x x
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> *(emphasis supplied)*

A combined reading of the several provisions of Order 22 of the Code makes the following position clear:

(a) When the sole plaintiff dies and the right to sue survives, on an application made in that behalf, the court shall cause the legal representative of the deceased plaintiff to be brought on record and proceed with the suit.

(b) If the court holds that the right to sue does not survive on the death of the plaintiff, the suit will abate under Rule 1 of Order 22 of the Code.

(c) Even where the right to sue survives, if no application is made for making the legal representative a party to the suit, within the time limited by law (that is a period of 90 days from the date of death of the plaintiff prescribed for making an application to make the legal representative a party under Article 120 of the Limitation Act, 1963), the suit abates, as per Rule 3(2) of Order 22 of the Code.

(d) Abatement occurs as a legal consequence of (i) court holding that the right to sue does not survive; or (ii) no application being made by any legal representative of the deceased plaintiff to come on record and continue the suit. Abatement is not dependant upon any formal order of the court that the suit has abated.

(e) Even though a formal order declaring the abatement is not necessary when the suit abates, as the proceedings in the suit are likely to linger and will not be closed without a formal order of the court, the court is usually to make an order recording that the suit has abated, or dismiss the suit by reason of abatement under Order 22 of the Code.

(f) Where a suit abates or where the suit is dismissed, any person claiming to be the legal representative of the deceased plaintiff may apply for setting aside the abatement or dismissal of the suit under Order 22 Rule 9 (2) of the Code. If sufficient cause is shown, the court will set aside the abatement or dismissal. If however such application is dismissed, the order dismissing such an application is open to challenge in an appeal under Order 43 Rule 1(k) of the Code.

(g) A person claiming to be the legal representative cannot make an application under rule 9(2) of order 22 for setting aside the abatement or dismissal, if he had already applied under order 22 Rule 3 for being brought on record within time and his application had been dismissed after an enquiry under Rule 5 of Order 22, on the ground that he is not the legal representative.

6. We may next consider the remedies available to an applicant whose application under Order 22 Rule 3 of the Code, for being added as a party to the suit as legal representative of the deceased plaintiff, has been rejected. The normal remedies available under the Code whenever a civil court makes an order under the Code are as under:

(i) Where the order is a 'decree' as defined under section 2(2) of the Code, an appeal would lie under section 96 of the Code (with a provision for a second appeal under section 100 of the Code).

(ii) When the order is not a 'decree', but is an order which is one among those enumerated in section 104 or Rule 1 of Order 43, an appeal would lie under section 104 or under section 104 read with order 43, Rule 1 of the Code (without any provision for a second appeal).

(iii) If the order is neither a 'decree', nor an appealable 'order' enumerated in section 104 or Order 43 Rule 1, a revision would lie under section 115 of the Code, if it satisfies the requirements of that section.

When a party is aggrieved by any decree or order, he can also seek review as provided in Section 114 subject to fulfillment of the conditions contained in that section and Order 47 Rule 1 of the Code. Be that as it may. The difference between a 'decree' appealable under section 96 and an 'order' appealable under section 104 is that a second appeal is available in respect of decrees in first appeals under section 96, whereas no further appeal lies from an order in an appeal under section 104 and Order 43, Rule 1 of the Code. The question for consideration in this case is whether the order dated 31.8.1996 of the trial court dismissing an application under Order 22 Rule 3

and consequently dismissing the suit is an order amenable to the remedy of appeal or revision. If the remedy is by way of appeal, the incidental question would be whether it is under section 96, or under section 104 read with Order 43, Rule 1 of the Code.

7. Section 96 of the Code provides that save where otherwise expressly provided in the body of the Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any court exercising original jurisdiction to the court authorized to hear appeals from the decision of such court. The word 'decree' is defined under section 2(2) of the Code thus:

> "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 144, but shall not include –
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> (a) any adjudication from which an appeal lies as an appeal from an order, or
> (b) any order of dismissal for default.
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> Explanation.—A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final;"

A reading of the definition of decree in Section 2(2) shows that the following essential requirements should be fulfilled if an order should be treated as a 'decree' :

(i) there should be an adjudication in a suit;

(ii) the adjudication should result in a formal expression which is conclusive so far as the court expressing it;

(iii) the adjudication should determine the rights of parties with regard to all or any of the matters in controversy in the suit; and

(iv) the adjudication should be one from which an appeal does not lie as an appeal from an order (under section 104 and order 43 Rule 1 of the Code) nor should it be an order dismissing the suit for default.

(emphasis supplied)

8. There is no dispute that the order dated 31.8.1996 made on the application under Rules 3 and 5 of Order 22 of the trial court satisfies requirements (i) and (ii). The question is whether it satisfies the third and fourth requirements. We may first consider the fourth requirement. No appeal is provided against an order under Order 22 Rule 3 and 5 of the Code, either under section 104 or Order 43 Rule 1 of the Code. Clause (k) of Rule 1 of Order 43 of the Code however provides that an appeal shall lie under Section 104 of the Code, from an order under Rule 9 of Order 22 refusing to set aside the abatement or dismissal of a suit. Sub-Rule (2) of Rule 9 of Order 22 permits a legal representative of a deceased plaintiff to apply for an

order to set aside the abatement or dismissal under Order 22 of the Code. An order under Rule 9(2) refusing to set aside an abatement or dismissal of the suit is contemplated, only where there is abatement or dismissal under order 22 and an application has been made by a legal representative to set aside such abatement or dismissal. But where a person claiming to be the legal representative had already filed an application under Order 22 Rule 3 within the period of limitation, and such application has been dismissed on the ground that he is not a legal representative, there is no question of such applicant under Order 22 Rule 3, filing an application under Rule 9(2) for setting aside the abatement or dismissal. An application under Rule 9(2) can be filed only if there is abatement or dismissal under Order 22 on account of no application being made. Therefore when an order is passed under Order 22 Rules 3 and 5 of the Code, dismissing an application by a person claiming to be a legal representative on the ground that he is not a legal representative and consequently dismissing the suit, it will not be a dismissal under Rule 9(2) of Order 22 which is amenable for an appeal under section 104 read with Order 43 Rule 1(k) of the Code. It therefore follows that an order under Order 22 Rule 3 and 5 is not appealable under section 104 or Order 43 Rule 1 of the Code.

9. Having found that the order under Order dated 31.8.1996 complied with requirements (i), (ii) and (iv), what remains to be considered is whether it fulfils requirement (iii) also, so that it will answer the definition of decree in section 2(2) of the Code. Requirement (iii) is that the adjudication must determine the rights of the parties with regard to all or any of the matters in controversy in the suit. The applicant in an application under Order 22 Rule 3 is not a party to the suit. An application under Order 22 Rule 3 is by a non-party requesting the court to make him a party as the legal representative of the deceased plaintiff. Necessarily unless the applicant in the application under Order 22 Rule 3 allowed and the applicant is permitted to come on record as the legal representative of the deceased, he will continue to be a non-party to the suit. When such an application by a non-party is dismissed after a determination of the question whether he is a legal representative of the deceased plaintiff, there is no adjudication determining the *rights of parties to the suit* with regard to all or any of the matters in controversy in the suit. It is determination of a collateral issue as to whether the applicant, who is not a party, should be permitted to come on record as the legal representative of the deceased. Therefore an order dismissing an application under Order 22 Rule 3 after an enquiry under Rule 5 and consequently dismissing the suit, is not a decree.

10. As the order dated 31.8.1996 is neither a 'decree' appealable under section 96 of the Code nor an order appealable under section 104 and Order 43 Rule 1, the remedy of the applicant under Order 22 Rule 3, is to file a revision. The High Court was therefore, right in its view that the adjudication of the question whether an applicant in an application under Order 22 Rule 3 was a legatee under a valid will executed by the deceased plaintiff in his favour, was not a not a decree and therefore the remedy of the applicant was to file a revision.

11. The appellant submitted that even if the rejection of an application under Order 22 Rule 3 after an enquiry under Rule 5, may not amount to a decree, the consequential dismissal of the suit on the ground that there is no legal representative, is a denial of the substantive rights claimed by the plaintiff against the defendant in the suit. This contention is clearly flawed. If the court orders that suit has abated or dismissed the suit as having abated, as a consequence of rejection of an application under Order 22 Rule 3 of the Code, as noticed above, there is no determination of rights of parties with regard to any of the matters in controversy in the suit and therefore the order is not a decree. But if an order declares that the suit has abated, or dismisses a suit not as a consequence of legal representatives filing any application to

come on record, but in view of a finding that right to sue does not survive on the death of sole plaintiff, there is an adjudication determining the rights of parties in regard to all or any of the matters in controversy in the suit, and such order will be a decree. But that is not the case here. Similar contention raised before various High Courts have repeatedly negatived by different High Courts. It is sufficient to refer to two of them with which we respectfully agree.

12. A full Bench decision of the Lahore High Court in *Niranjan Nath v. Afzal Hussain - AIR 1916 Lahore 245* held as follows:

> "After examining the matter carefully we consider that if a court passes a purely formal order recognizing the abatement, which is a *fait accompli*, such an order, though virtually disposing of the suit, does not adjudicate upon any rights, and cannot be treated as a decree. An order of this nature, as observed already, merely records an abatement, which has already taken place by reason of the lapse of six months*, after the death of the plaintiff, and does not contain any decision arrived at by the court. In a case of this kind Order 22, Rule 9 allows the legal representative to make an application for the revival of the suit, and the only question the court is thereupon required to determine is whether the applicant was prevented by any sufficient cause from continuing his suit, and if the decision is in the negative, the aggrieved party is entitled to prefer an appeal against that order under Order 43 Rule 1(k). The decision of the appellate court is, however, made final and a second appeal is not competent.
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> The language of Order 22, Rule 9(2) when carefully examined, leads us to the conclusion that it is confined to cases in which the abatement takes place by reason of an application not having been made within the time permitted by law to implead the legal representative of the deceased plaintiff or the deceased defendant, and that it has no applicability to cases in which the suit has abated on account of some other cause. This view receives support from the decision of the Madras High Court in *Subramania Iyer v. Venkataramier*

(1915) 31 I.C. 4. *Suppose, the sole plaintiff in a suit dies, and in spite of an application within six months* by his legal representative the court holds that the right to sue does not survive, and consequently directs the abatement* of the suit. An abatement of this character obviously stands on a different footing. It does no take place *ipso facto*. The court does not record a merely formal order reciting a past event, as in the case of an abatement in consequence of an application not having been made within the prescribed period to implead the legal representative, but it exercises its mind in the determination of a matter in controversy. The decision of the court directing the abatement of the suit is, in our opinion, a decree, because the right to represent the deceased is a point in controversy between the claimant and the opposite party, and the adjudicator determines their rights with respect thereto, and puts an end to the case, there being no appeal from the adjudication as an appeal from an order. An application under Rule 9 is, as observed above, incompetent and it is difficult to believe that the Legislature intended that the decision of a matter, which concludes the suit, should be final and that the aggrieved party should have no remedy whatever.

(*what is referred as 'six months' is three months, under Article 120 of Limitation Act, 1963).

(emphasis supplied)

13. In *Mitthulal vs. Badri Prasad* – AIR 1981 Madh. Pradesh 1, a full Bench of the Madhya Pradesh High Court held as follows :

"There seems to be a general consensus of judicial opinion that all orders of abatement are not decrees. Only those orders of abatement are decrees in which the Court comes to the conclusion that the right to sue does not survive on the death of the sole plaintiff or on the death of one of the plaintiffs to the surviving plaintiffs. *The orders of abatement which follow consequent on the failure of the legal representative of plaintiff to be brought on record within the period allowed by law or due to the Court deciding that a particular applicant is not the legal representative, such orders do not amount to decree.* The reason being that the abatement is automatic consequent on the failure of the legal representative to be brought on record within the period of limitation and no formal order is necessary. So there is no adjudication on the rights of the parties in the suit or appeal by such an order. An order under Order 22, Rule 5 cannot obviously be said to fall within the definition of decree for the following reasons (i) the order is made only for the purpose of determining who should continue the suit as brought by the original plaintiff. It is not intended to determine and it does not, in fact, determine the rights of the

> parties with regard to any of the matters in controversy in suit. The question that arises for decision and actually decided is not one arising in the suit itself but is one that arises in a collateral proceeding and has to be got decided before the suit can go on; and (ii) In order to operate as a decree, the adjudication must be one between the parties to the original suit or their legal representatives, and with regard to only matters in controversy between the original parties and, therefore, cannot include a decision of the question as to whether certain individual is or is not entitled to represent one of such parties. In cases where the Court comes to the conclusion that the right to sue does not survive consequent on the death of the sole plaintiff or one of the plaintiffs to the surviving plaintiffs, there is final adjudication of the rights of the parties and the order amounts to decree."
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> *(emphasis supplied)*

Re: Question (ii)

14. The trial court concentrated upon the evidence of the attesting witness (Balwant) to the will, and found it inadequate and therefore held that the will not proved. But the appellate court, in addition relied upon the fact that deceased plaintiff himself, when he was alive, had filed an application on 25.10.1994 where he referred to the execution of the will. The appellate court concluded that the evidence of the attesting witness when read with statement/admission of the deceased plaintiff himself, established due execution of the will and that the appellant was the legatee under the will of plaintiff. Thus, the appellate court had given cogent reasons for accepting the appellant to be the legal representative of the deceased plaintiff, in pursuance of the will. The High Court, after holding that the appeal filed by appellant under section 96 of the Code before the District Court was not

maintainable, should not have proceeded to consider the matter on merits. But the High Court chose to examine the merits of the matter, in a brief and casual manner and held that the finding of the trial court was preferable and finding of the first appellate court was erroneous. The High Court failed to consider all the facts and circumstances considered by the appellate court. Having held that the appellate court could not have entertained the appeal, the High Court was not required to examine the matter on merits. If it chose to do so, it ought to have done in thoroughly, which it did not.

Conclusion

15. In view of the above, the finding of the High Court that the order dated 31.1.1996 passed by the trial court, was not appealable is upheld. The finding of the High Court that the will was not proved and therefore, the appellant was not a legal representative is set aside as the said finding was not warranted without consideration of the entire evidence. As a consequence, it will be open to the appellant to challenge the order dated 31.8.1996 in a revision petition before the High Court and if such a revision is filed, the period spent till now in *bona fide* litigation, shall have to be excluded for purposes of limitation.

16. We accordingly allow this appeal in part and set aside the finding of the High Court on the merits of the matter. As we have upheld the finding of the High Court that the order dated 31.8.1996 was not a decree and not appealable, we uphold the setting aside of the judgment dated 28.1.1998 of the appellate court, but reserve liberty to the appellant to challenge the order dated 31.8.1996 in revision. If a revision is filed within 90 days from today, the High Court will condone the delay in view of pendency of the matter till now.

……..J.
(R V Raveendran)

New Delhi;
July 4, 2011.

……..J.
(A K Patnaik)