

Gurcharan Singh vs Surjit Singh & Anr on 2 November, 2012

Equivalent citations: AIRONLINE 2012 SC 459

Author: A. K. Patnaik

Bench: A. K. Patnaik

Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

I.A. NOS. 2 TO 6

IN

SPECIAL LEAVE PETITION (C) No. 7735 of 2010

Gurcharan Singh

... Petitioner

Versus

Surjit Singh & Anr.

... Respondents

O R D E R

These interlocutory applications have been filed by the petitioner in Special Leave Petition No.7735 of 2010. I.A. No. 2 of 2011 is an application for substitution of legal representatives of deceased respondent No.1. As respondent no.1 died on 09.06.2009 and the application for substitution has been filed on 05.09.2011, I.A. No.3 of 2011 has been filed for condonation of delay in filing the application for substitution of legal representatives of the deceased respondent No.1. The question which I have to decide is whether an application for substitution of a respondent who was dead when the Special Leave Petition was filed was maintainable, and if not, the remedy of the petitioner when he comes to learn that the respondent was actually dead when he filed the Special Leave Petition.

2. Learned counsel for the petitioner relied on the provisions of Order XXII of the Code of Civil Procedure, 1908 (for short “the CPC”) as well as the amendments made thereto by the High Court of Punjab and Haryana and submitted that even where the respondent was dead when the Special Leave Petition was filed, his legal heirs can be substituted under these provisions of the C.P.C. He also relied on the decisions in Bank of Commerce Ltd., Khulna v. Protab Chandra Ghose and Others

[AIR (33) 1946 Federal Court 13], (Adusumilli) Gopalakrishnayya & Anr. v. Adivi Lakshmana Rao [AIR 1925 Madras 1210], H.H. Darbar Alabhai Vajsurbhai & Ors. v. Bhura Bhaya & Ors. [AIR 1937 Bombay 401], Sachindra Chandra Chakravarti v. Jnanendra Narayan Singh Roy & Anr. [AIR 1963 Calcutta 417], State of West Bengal v. Manisha Maity and Others [AIR 1965 Calcutta 459], Angadi Veetil Sreedharan vs. Cheruvalli Illath Sreedharan Embrandiri Manoor [AIR 1968 Kerala 196], Vantaku Appalanaidu & Ors. v. Peddinti Demudamma & Anr. [AIR 1982 A.P. 281], Karuppaswamy and Others v. C. Ramamurthy [AIR 1993 SC 2324] and Ram Kala v. Deputy Director (Consolidation) and Others [(1997) 7 SCC 498].

3. I have perused the aforesaid decisions cited by learned counsel for the petitioner and I find that in Bank of Commerce Ltd., Khulna vs. Protab Chandra Ghose and Others (supra), the Federal Court took the view that where an appeal has to be preferred for the first time against the legal heir of a person in whose favour the lower Court had passed a decree, the mere fact that an appeal had already been preferred as against other persons will not justify the application being treated merely as one to add a party because it is in substance an appeal preferred against him for the first time. After taking this view, the Federal Court held that an application for substitution of legal representatives of a respondent, who was dead before the filing of the appeal, must be treated as if appeal is filed for the first time against legal representatives of the deceased respondent and the delay in making the application is only to be excused under Section 5 of the Limitation Act if the delay is satisfactorily explained.

4. In (Adusumilli) Gopalakrishnayya & Anr. v. Adivi Lakshmana Rao (supra), the facts were that an appeal had been presented by the appellant against a person who was dead at the time of presentation and the Full Bench of the Madras High Court took the view that although such an appeal may be incompetent owing to the wrong person being named as respondent, the Court which deals with it has full power under Section 153 of the CPC to direct an amendment of the appeal memorandum and if the appeal is out of time against the legal representatives, the Court will have to excuse the delay in presentation of the appeal before it in exercise of its discretion. The Full Bench overruled the contrary view of a Division Bench of the Madras High Court in Govind Kaviraj Purohito v. Gauranga Sa [AIR 1924 Madras 56] that an appeal filed against a dead person has to be dismissed. The Full Bench of the Madras High Court further held that Rule 6 of Order 15 of the Federal Court Rules, 1942, which dealt with substitution of the representative of one who is a party to an appeal and for addition of party did not apply to a party who was dead at the time of filing of the appeal.

5. The Calcutta High Court has taken a similar view in State of West Bengal v. Manisha Maity (supra) that Order XXII, Rule 4 of the CPC providing for the procedure for substitution of the heirs and legal representatives of the deceased defendants has no application when the appeal itself was preferred against a dead person. The Division Bench of the Calcutta High Court, however, has suggested that in such a case:

“The remedy of an appellant, who has unknowingly filed an appeal against a dead person, is to file an application for presentation of the appeal against the heirs of the dead person afresh. If the time for filing the appeal was in the meantime over, he is to

present an application, under Section 5 of the Limitation Act, therein explaining the delay in presenting the appeal afresh against the heirs of the dead person. If he can make out sufficient cause for making the belated prayer, the Court may allow the same, amend the cause title of the memorandum of appeal by incorporation of the names of the heirs and legal representatives of the dead person and treat the appeal as a freshly presented appeal against the heirs.”

6. Thus, the aforesaid authorities are clear that where a party has been impleaded as respondent in an appeal but such respondent was dead before filing of the appeal, the remedy of the appellant is not to file an application for substitution of legal representatives of such respondent, but to file an application for an amendment of the appeal memorandum and in a case where such application for amendment is filed beyond the limitation prescribed for filing the appeal, the appellant must also file an application under Section 5 of the Limitation Act for condonation of delay in filing the application for amendment and if the Court is satisfied with the explanation given by the appellant for the delay, the Court can condone the delay and allow the amendment of the appeal memorandum.

7. Order XVI of the Supreme Court Rules, 1966 is titled “Appeals by Special Leave”. Rules 8 and 9 in Order XVI which provide for substitution and addition of parties are extracted hereinbelow:

“8. Where any person is sought to be impleaded in the petition as the legal representative of any party to the proceedings in the Court below, the petition shall contain a prayer for bringing on record such person as the legal representative and shall be supported by an affidavit setting out the facts showing him to be the proper person to be entered on the record as such legal representative.

9. Where at any time between the filing of the petition for special leave to appeal and the hearing thereof the record becomes defective by reason of the death or change of status of a party to the appeal or for any other reason, an application shall be made to the Court stating who is the proper person to be substituted or entered on the record in place of or in addition to the party on record. Provisions contained in rule 33 of Order XV shall apply to the hearing of such applications.” Considering the authorities discussed above, the aforesaid provisions of Order XVI Rules 8 and 9 will apply where at the time of filing of the Special Leave Petition, the respondent was alive and after the filing of the Special Leave Petition his legal representatives are sought to be substituted, but will not apply where the respondent was dead when the Special Leave Petition was filed. Where the respondent was dead when the Special Leave Petition was filed, the Court can, in the interest of justice, allow an application for amendment of the Special Leave Petition and condone the delay in filing such an application for amendment if the delay is satisfactorily explained.

8. I.A. No.2 of 2011 is, therefore, treated as an application for amendment of the Special Leave Petition and as the delay in filing the application for amendment of the Special Leave Petition has been satisfactorily explained in I.A. No.3 of 2011, the delay is condoned and in the interests of

justice, I.A. Nos. 2 and 3 of 2011 are allowed. The prayers in I.A. Nos. 4 and 5 are for exemption from filing official translation and from filing death certificate of the deceased and are allowed. I.A. No.6 of 2011 is for deletion of proforma respondent No.2 Ajaib Singh, who appears to be the attorney of the contesting respondent No.1, and is allowed at the risk of the petitioner. The I.As. stand disposed of.

.....J. (A. K. Patnaik) New Delhi, November 02, 2012.