Himachal Pradesh High Court
Bala Ram And Ors. vs State Of Himachal Pradesh And Ors. on 4 June, 1993
Equivalent citations: AIR 1994 HP 5
Author: D Gupta
Bench: D Gupta
JUDGMENT Devinder Gupta, J.

1. The order passed on 25th July, 1991 by the Additional District Judge, Nahan, Sirmaur District Camp at Solan, is under challenge in this revision petition at the behest of the plaintiffs, who were respondents in the appeal before the lower appellate court. The facts giving rise to the revision petition may be narrated.

2. A suit was filed by the plaintiffs-petitioners in the court of Sub Judge, Kandaghat, wherein they claimed a decree for declaration that they, along with pro forma defendants, are the owners in possession of the suit land according to the shares, as per Shajra Nasab and the entries in the revenue record as also certain mutations were illegal, against facts and had no effect on their rights and also that they along with pro forma defendants alone had got a right to get compensation in respect . of the part of the suit property, which had been acquired by the State of Himachal Pradesh. After a protracted trial, the suit was decreed on 22nd June, 1987. The decree was passed to the following effect:

".....the plaintiffs and pro forma defendants are held to be owners in possession of the suit land and that they are and not Gram Panchayat entitled to receive the compcn-

sation for acquisition of a part of it by the State Government....."

3. Feeling aggrieved, an appeal was preferred by the State of Himachal Pradesh. On 13th September, 1990. a statement was made by the counsel for the plaintiffs that one of the plaintiffs, namely, Hans Raj, who was respondent No. 6 in the appeal had died. The Additional District Attorney, appearing for the appellant-State of Himachal Pradesh, sought adjournment to enable him to take steps for bringing on record the legal representatives. Further adjournment was sought on 13th November, 1990, Steps were not taken, and again adjournment was sought on 13th December, 1990,18th January, 1991 and 13th March, 1991. It was on 14th March, 1991 that an application was moved to bring on record the legal representatives of deceased Hans Raj. It was stated in the application that Hans Raj had died on 9th July, 1990 and had left behind Smt. Saras-wati, his widow and two sons Mohan Dutt and Ramesh Dutt. It was further stated in the application that the factum of death came to the knowledge of the appellant on 19th January, 1991 when the information, after verification, was received from Tehsildar, Solan and the application was being made in time. In para 4 of the application, it was stated that even otherwise, if the court comes to the conclusion that the application is not within time, the same be condoned in the interests of justice and consequently a prayer was made for bringing on record the legal representatives. This application was opposed by the plaintiffs, who stated that the averments made in the same were patently wrong since the same were contrary to the record. Knowledge of the death was acquired by the appellant on 13th September, 1990, when a statement was made at bar in the presence of Additional District Attorney.

Even from the date of acquiring knowledge, the application had not been made within a period of 90 days. The appeal had, in fact, abated on the expiry of 90 days from the date of death and since there was no prayer for setting aside abatement, the application was liable to be dismissed and appeal deserved to be dismissed in toto.

4. Through the impugned order, the appellate court found that even as per the averments made in the application of the State that one of the plaintiffs, who was respondent in the appeal, had died on 9th July, 1990, no application was made within the period of 90 days either from the date of death or from the date of acquiring knowledge, namely, 13th September, 1990, when the intimation of death was given by the counsel in the presence of the Additional District Attorney, the appeal qua the deceased stood abated on the expiry of 90 days from 13th September, 1990. No cogent and sufficient reason had been assigned in the application for condoning the delay and as such there was no question of setting aside the abatement and moreover no such prayer had been made in the application. Having come to the conclusion that the appeal had abated, as against deceased plaintiff No. 10, the court proceeded to examine the question as to whether the appeal should proceed in the absence of deceased or not. It was remarked that since the share of the deceased-plaintiff in the suit land was specified one and was ascertainable and there was no bar for the deceased to file a separate suit against the appellant, without impleading the remaining plaintiffs as parties, the appeal had abated only against deceased and not against the surviving plaintiffs. It is this order, which is under challenge in this appeal by the appellant.

5. The State of Himachal Pradesh has not challenged the order passed by the appellate court by which it held that the appeal stood abated against the deceased.

6. It is contended by Mr. Ramakant Sharma appearing for the petitioners that the deceased held the property along with the other plaintiffs as co-owner in whose favour a joint decree had been passed. The effect of the abatement of the appeal against the deceased was that the same was not now properly constituted and ought to have been dismissed, as such, In support of his submission, reliance has been placed by him on number of judgments, which would be shortly noticed.

7. Shri G. D. Verma, learned Additional Advocate General, appearing for the respondent has contended that though the part of the order by which it was held that the appeal stood abated against the deceased had not been challenged separately yet while hearing the revision petition, the court is not powerless to upset that part of the order, since there was a patent illegality therein. After the application had been moved for bringing on record the legal representatives, it was incumbent for the appellate court to have framed a proper issue as to whether the appeal had abated or not or whether the delay in filing the application was liable to be condoned or not and thereafter opportunity ought to have been allowed to the parties to lead evidence and the matter could have been decided thereafter. Since proper procedure was not followed, the order was liable to be quashed and set aside, in so far as it had held that the appeal had abated qua the-deceased. He has also placed reliance upon number of judgments.

8. I have heard the learned counsel for the parties and gone through the record. Though, no separate appeal was preferred by the respondent to question that part of the order by which the appeal was

held to have abated against deceased plaintiff, yet, while hearing the plaintiffs' revision, I am inclined to go into the question as to whether the lower appellate court was justified in holding that the appeal had abated against the deceased or not and also to see that whether proper procedure was followed or not.

9. As noticed above, due intimation, as per the provisions of Order XXII Rule 10A of the Civil P.C. (hereinafter called as 'the Code') was given by the learned counsel for the plaintiffs about the death of the party, whom he represented, which intimation was given on 13th September, 1990, in the presence of the Additional District Attorney. The purpose of introduction of Rule 10A in Order XXII of the Code by Civil P.C. (Amendment) Act No. 104 of 1976 was specifically to mitigate the hardship arising from the fact that the party to an appeal may not come to know about the death of other party during the pendency of the appeal, when it is awaiting its turn for being heard. Consequently, a duty is cast upon the advocate, appearing for the party, who comes to know about the death of the party, to intimate the death of the party represented by him and it is for this purpose that a deeming fiction has been introduced that a contract between the dead client and the lawyer subsists to the limited extent, after the death of client.

10. The death occurred on 9th July, 1990, but knowledge was acquired by the State of the same only on 13th September, 1990, when due intimation was given to its representative, namely, A.D.A., whereafter four adjournments were sought and the application was moved only on 14th March, 1991. No reason at all is assigned in the application as to why the application was not made within the period of limitation. Even no sufficient cause has been pleaded in the application. In a casual manner, it has been stated in the application, that 'if the court comes to the conclusion that the application is not within time so the same may be condoned in the interests of justice'.

11. An application to implead the legal representatives of the deceased defendant, in a suit or of the deceased respondent, in an appeal is governed by Article 120 of the Limitation Act. The period of limitation commences to run from the date of death and not from the date of knowledge. The abatement is automatic and no separate order is required to be passed. Sub-rule(3) of Rule4 of Order XXll,in clear terms lays down that where within the time limited by law, no application is made under Sub-rule (1), the suit shall abate as against the deceased defendant (s). By virtue of Rule 11 of Order XXII of the Code, this provision is also equally applicable in case of appellant and consequently, if within the time ' limited by law, no application is made under Sub-rule (1), the appeal shall abate against the deceased respondent.

12. Rule 9 of Order XXII of the Code is a disabling provision and states that when a suit abates or is dismissed as having abated, no fresh suit shall be brought on the same cause of action. Sub-rule (2) thereof enables the plaintiff or the person claiming to be the legal representative of the deceased, to apply for an order to set aside the abatement or dismissal and empowers the court to set aside the abatement or dismissal, in case it is proved that the plaintiff or the person claiming to be legal representative was prevented by sufficient cause from continuing with the suit. Sub-rule (3) makes the provision of Section 5 of the Limitation Act applicable to an application moved under Sub-rule (2).

13. Reading of Rule 9 of Order XXII of the Code, makes it clear that before the court exercises its power to set aside the abatement or to condone the delay in making application for setting aside the abatement, there should be necessary averments made in the application, disclosing sufficient cause. In case on the face of it, no sufficient cause is disclosed in the application, the court cannot exercise its inherent jurisdiction to set aside the abatement. For setting aside the abatement, existence of a sufficient cause is a condition precedent. When in the application there is no allegation that the plaintiff or the appellant was prevented from moving the application within the prescribed period of limitation, for setting aside the abatement, or for condoning the delay in filing the application beyond the period of limitation, it will not be permissible for the court, in exercise of inherent jurisdiction, to set aside the abatement. In the instant case, absolutely no case is made out for not making the application within the period of limitation, more particularly, after the knowledge had been acquired on 13th September, 1990, which aspect had been considered by the lower appellate court and for that reason, I do not see any ground to interfere with that part of the order by which the court held that the appeal had abated against the deceased-plaintiff (respondent No. 6 in the appeal). The trial of the application for bringing on record the legal representatives is not regulated by the procedure prescribed for the trial of the suit. Such like miscellaneous applications, under the Code, are required to be heard and disposed of on the basis of the affidavits. There was no necessity for the lower appellate court to have framed an issue and called upon the parties to lead evidence, since there was nothing to be tried on the basis of bare allegations made in the application. It was a simple application that one of the respondents in the appeal had died and in case the court was of the opinion that the application was not within time, in the interests of justice, the delay deserved to be condoned. The court committed no procedural irregularity in disposing of the application, on the basis of the material on record, which was not capable of being disputed, nor it was disputed. Moreover, no prayer was made for leading any evidence or placing more facts on record.

14. The next question to be decided is with regard to the effect of the abatement of the appeal qua the deceased. The decision in Ramagya Prasad Gupta v. Murli Prasad, AIR 1972 SC 1181 noted with approval the three tests applied by the courts in order to determine if the appeal abates in its entirety and held that the tests are not cumulative and even if one of them is satisfied, the court would dismiss the appeal as not properly constituted. The three tests generally applied are: (a) where the appeal, if. allowed, would lead to the court passing a decree which would be contradictory to the decree which has become final with respect to same subject matter between the appellant and deceased respondent, (b) where the appellant could no have brought an action for the necessary relief against the respondents alone who are still before the court and (c) where the decree against the surviving respondents, if the appeal succeeds, be ineffective, that is to say it cannot be successfully executed. In State of Punjab v. Nathu Ram, AIR 1962 SC 89, where the land owned by two persons jointly had been acquired under the Punjab Land Acquisition (Defence of India) Rules and against the award of compensation therein, an appeal was preferred by the State and pending the appeal, one of the owners died and his legal representatives were not brought on record, it was held that the entire appeal abated. The test applied was that the appeal of the State, if allowed, would lead to the court passing a decree, which would be contradictory to the decree, which had become final with respect to the same subject matter between the appellant and deceased respondent.

15. The aforementioned procedure was not followed by the lower appellate court. It proceeded to apply another test, namely, the plaintiffs having separate shares in the property and that the deceased could have brought an independent action against the State, without impleading the other plaintiffs as party. The mere fact that the claimants had separate shares in the property is not a conclusive factor. Specification of shares or of interest of deceased does not affect the nature of decree and the capacity of joint decree to execute the decree in its entirety. The plaintiffs had claimed to be co-owners in the land and not as joint owners. In case the claim had not been made as joint owners, even the test of the surviving respondents, in the appeal effectively representing the estate of the deceased would not be made applicable.

16. A Division Bench of this Court in Shiv Ram v. Bhagat Ram, ILR 1978 HP 158 : (AIR 1979 HP 12), held that when aco-owner dies, his interest can be represented only by his own legal representatives and not by his co-owners. It is only in case of joint owners, where the position is different, because the surviving joint owners can represent the interest of the deceased joint owners, as effectively as the heirs of the said deceased joint owner can, unless, of course, the peculiar facts of a given case reveal that the deceased joint owner had some adverse claims against the surviving joint owners.

17. In the case in hand, it was a joint decree, which had been passed in favour of the co-owners, holding them to be the owners of the suit property and entitled to compensation for acquisition of part of the property. The effect of the abatement, in so far as the deceased is concerned, was affirmance of the decree qua him. In case the first test is applied, it would result in conflicting decrees, in the event of the appeal of the State being allowed, with respect to the same subject matter. The nature of the decree is such which the deceased alone could have executed the same.

18. In view of the aforementioned legal position, the impugned order to the extent that the appeal abated only qua deceased respondent and not against the surviving respondents, cannot be sustained and deserves to be set aside. Consequently, the revision petition is allowed by holding that as a result of the abatement of the appeal qua Hans Raj respondent No. 6, the appeal is not properly constituted and is liable to be dismissed.