

## **Bhagwan Swaroop And Ors. vs Mool Chand And Ors. on 3 February, 1983**

**Equivalent citations: AIR1983SC355, 1983(31)BLJR228, 1983(1)SCALE204, (1983)2SCC132, AIR 1983 SUPREME COURT 355, (1983) SCWR 1, (1983) LS 23, 1983 BLJR 228, 1983 UJ (SC) 313, 1983 (1) CIV LJ 529, 1983 (15) LAWYER 54, 1983 CHANDLR(CIV&CRI) 529, 1983 (2) SCC 132, (1983) 9 ALL LR 170**

**Author: Amarendra Nath Sen**

**Bench: A.N. Sen, D.A. Desai**

### **JUDGMENT**

1. Special leave granted.

2. Father of appellants Nos. 1 and 2 one Shri Maharaj Swamp and 8 others filed a suit ag

3. A Division Bench of the Rajasthan High Court held that the preliminary decree was one

4. It is true that it was incumbent upon the appellant to implead the heirs and legal re

5. In a suit for partition, the position of plaintiffs and defendants can be interchange

6. Having meticulously examined the contention advanced by the learned Counsel on behal

7. As there is some negligence on behalf of the appellants in moving the application in

8. Accordingly, we allow this appeal set aside the judgment of the High Court dated 27th

Amarendra Nath Sen, J.

9. I have read the judgment and order proposed to be delivered by my learned brother Desai, J.

10. My learned brother in his judgment has set out the facts material for the purpose of disposal of this case. It does not, therefore, become necessary to reproduce the same.

11. My learned brother in his judgment has held:

It is equally true that the appellants were negligent in moving the proper application, We would not question the finding of the High Court that appellants Nos. 2, 3 and 4 know about the death of the deceased respondent No. 1. This being a suit for partition of joint family property, parties are closely interrelated and it is reasonable to believe that at least some of the appellants must have attended the funeral of the deceased respondent No. 1, as contended on behalf of the contesting respondent No. 2. There is some force in the contention that when a specific provision is made as provided in Order 22, R. 4, a resort to the general provision like Order 1, Rule 10 may not be appropriate. But the laws of procedure are devised for advancing justice and not impeding the same. In Sangram Singh v. Election Tribunal, Kotah , this Court observed that a Code of Procedure is designed to facilitate justice and further its ends; not a penal enactment for punishment and penalties; not a thing designed to trip people up. This was reaffirmed in Kalipar Das v. Bimal Krishna Sen .

12. It is no doubt true that a Code of Procedure 'is designed to facilitate justice and further its ends and it is not a penal enactment for punishment and penalty and not a thing designed to trip people up'. Procedural laws are no doubt devised and enacted for the purposes of advancing justice. Procedural laws, however, are also laws and are enacted to be obeyed and implemented. The laws of procedure by themselves do not create any impediment or obstruction in the matter of doing justice to the parties. On the other hand, the main purpose and object of enacting procedural laws is to see that justice is done to the parties. In the absence of procedural laws regulating procedure as to dealing with any dispute between the parties, the cause of justice suffers and justice will be in a state of 'confusion and quandary. Difficulties arise when parties are at default hi complying with the laws of procedure. As procedure is aptly described to be the hand-maid of justice, the Court may in appropriate cases ignore or excuse a mere irregularity in the observance of the procedural law in the larger interest of justice. It is, however, always to be borne in mind that procedural laws' are as valid as any other law and are enacted to be observed and have not been enacted merely to be brushed aside by the Court Justice means justice to the parties in any particular case and justice according to law. If procedural laws are properly observed, as they should be observed, no problem arises for the Court for considering whether any lapse in the observance of the procedural law needs to be excused or overlooked. As I have already observed depending on the facts and circumstances of a particular case in the larger interests of administration of justice the Court may and the Court in fact does, excuse or overlook a mere irregularity or a trivial breach in the observance of any procedural law for doing real and substantial justice to the parties and the Court passes proper orders which will serve the interests of justice best.

13. Excuse of lapses in compliance with the laws of procedure, as a matter of course, with the avowed object of doing substantial justice to the parties may in many many cases lead to miscarriage of justice.

14. Civil Procedure Code requires that in the event of death of a particular party, heirs and legal representatives of the deceased have to be brought on record within a particular period, provided

the cause of action survives. If the legal representatives are not brought on record within the stipulated period, certain consequences follow and the action abates either wholly or partially depending on the facts and circumstances of a particular case. The Code further provides that an application may be made for setting aside the abatement within a stipulated period. It is now well settled that an abatement can be set aside at any time even beyond the period prescribed for making an application for setting aside the abatement, if sufficient cause is shown explaining the delay in the making of the application. If, irrespective of the provisions of the Code and the merits of the case, abatements are to be set aside as a matter of course merely on the ground that abatement is only a consequence of non-compliance of law of procedure and substantial justice is denied to the parties, the result may really amount to a denial of justice and in an indefinite prolongation of a litigation

15. The provision fixing a particular time for making an application for bringing legal representatives on record with the consequence of the suit or appeal abating if no application is made within time, have been enacted for expeditious disposal of cases in the interest of proper administration of justice. It is further to be borne in mind that when a suit or an appeal abates, is very valuable right accrues to the other party and such a right is not to be ignored or interfered with lightly in the name of doing substantial justice to the party, as depriving a party of a lawful right created in the interest of administration of justice in the absence of good grounds results in injustice to the party concerned. For doing justice to the parties, the Courts have consistently held that whenever sufficient cause is shown by a party at default in making an application for substitution, abatement will have to be set aside as the good cause shown for explaining the delay in making the application is sufficient justification, to deprive the other party of the right that may accrue to the other party as a result of the abatement of the suit or appeal. The Courts have also consistently ruled that laches or negligence furnish no proper grounds for setting aside the abatement. In such cases, a party guilty of negligence or laches must bear the consequences of his laches and negligence and must suffer. In appropriate cases, taking into consideration all the facts and circumstances of a case, the Court may set aside the abatement, even if there be slight negligence or minor laches in not making an application within the time provided an overall picture of the entire case, requires such course for furthering the cause of justice. When negligence and laches are established on the part of the party who seeks to set aside the abatement, the application of such a party should be entertained only in the rarest of cases for furthering the ends of justice only and on proper terms.

16. In the present case, the appeal has been filed against a preliminary decree in a partition suit. A partition suit stands on a peculiar footing. In a partition suit any of the party can claim transposition from the category of the defendant to the category of the plaintiff and vice-versa. With the passing of the preliminary decree, shares of the parties are declared and rights of the parties pending the passing of the final decree are to an extent determined. As a result of the passing of the preliminary decree, certain rights do accrue to the parties subject to the results of the appeal filed. There is no doubt that there has been some amount of negligence on the part of the appellant in not making the application for substitution within time. The appellant had full knowledge of the death of the respondent who was a near relation of the appellant. The application made by the heirs of the deceased for substitution under Order 1, Rule. 10 of the CPC is indeed misconceived and has been rightly held to be so by the High Court. To my mind, it cannot be said that the High Court had acted

improperly or illegally in the facts and circumstances of this case in refusing to set aside the abatement. I have my doubts, as to whether it is proper for this Court to interfere with such orders passed by the High Court.

17. My learned brother is, however, of the view that in the facts and circumstances of this case, the orders of the High Court refusing to set aside the abatement and to bring the legal representatives on record should be set aside and the appeal should be heard on merits by the High Court.

18. In the peculiar facts and circumstances of this case, bearing in mind that the appeal is from a preliminary decree in a partition suit in which the heirs and legal representatives of the deceased respondent had also made an application, though 'misconceived, for being substituted and brought on record. I do not propose to press my doubts to the point of dissent. Hearing of the appeal on merits, in the instant case, cannot cause any irreparable prejudice to the parties though there can be no doubt that partition proceedings will have to be unnecessarily prolonged.

19. With these observations I agree with the order proposed by my learned brother.