

**Ram Kali Devi and ors. Vs. Ramesh Chander and ors.**

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**Court :** Delhi

**Decided On :** Mar-23-1981

**Reported in :** AIR1982Delhi14; 20(1981)DLT40; 1981RLR330

**Judge :** Sultan Singh, J.

**Acts :** [Code of Civil Procedure \(CPC\), 1908](#) - Order 22, Rule 3

**Appeal No. :** First Appeal No. 212 of 1979

**Appellant :** Ram Kali Devi and ors.

**Respondent :** Ramesh Chander and ors.

**Advocate for Pet/Ap. :** B.K. Choudhry; Daya Kishan,; A.P. Singh and;

**Judgement** :

ORDER

43(1) An appeal shall lie from the following orders under the provisions of Section 104, namely:- (a) ..... (k) an order under rule 9 of Order Xii refusing to set aside the abatement or dismissal of a suit.'

Learned counsel for the respondents submits that mere reading of this clause shows that an appeal lies only from an order refusing to set aside the abatement of a suit and not from an order refusing to set aside the abatement of appeal. Learned counsel for the appellant however submits that the word 'suit' in clause (k) includes an appeal. Counsel for the appellants in support of this submission relies upon Hari Saran Singh and others v. Syed Md. Eradat Hussain, 1925 Pat 162, Mir Wajid Ali v. Puspo Mandal and others, : AIR1938Pat125 , Raju Muduli v. Chinnaraju Naidv and others, Air 1941 Mad 51, Ganpat Bapuji v. Shri Maruti Doosthan, Tandulwadi, Air 1952 Nag 181 and Alphonao Nazareth v. XavierDias and others, Air 1971 Kar 79. In these authorities it has been held that an appeal lies from an order refusing to set aside the abatement of appeal. In some cases it has been observed that the word 'suit' in Order 43 rule I (k) of the Code includes appeal. In Raju Mudali (Supra) it is observed that the expression 'refusing to set aside abatement or dismissal of a suit' is merely a compendious way of referring to the provisions of Rule 9 of 22 of the Code It is further observed that if the word 'suit' in clause (k) of Rule I of Order 43 is to bear a different meaning from what it bears in Order 22 rule 9 of the Code it would be contrary to all rules of logical interpretation.

(5) In Ct. A. Ct. Nachiappa Chettiar and others v. Ct. A. Ct. Subramaniam Chettiar, : [1960]2SCR209 while interpreting the word 'suit occurring in Section 21 of the

Arbitration Act the court held that proceedings in appeal are continuation of the suit and the Mysore High Court after referring to the said Supreme Court judgment held that the word 'suit' in clause (k) of rule I of Order 43 of the Code includes in 'appeal'.

(6) Learned counsel for the respondents relies upon *Akkas Mia and others v. Abdul Aziz Bopari*, : AIR1929Cal532 , *Mahboob Hasan Khan and others v. Syed Bashir Hussain and others*, Air 1961 Allahabad 527, *Patel Dahyabhai Mathurbhai v. Dolia Bhaishanker Pitamber and others*, : AIR1963Guj258 and *Sat Pal L., Rameshwer Dial and another v. Budh Lalji and others*, . In these authorities it is observed that Rule 11 of Order 22 provides only for the application of that Order to appeals and that in doing so Order 22 applies to the appeals but there is no such provision in Order 43 rule I (k) of the Code which enables the word 'suit' to include an appeal. It is also observed that Rule 'J' of Order 22 of the Code applies not only to suits but to appeals as well but at the same time the statute does not provide an appeal while making the provision of clause (k) of Order 43 of the Code against every order passed under Order 22 rule 9 of the Code and that this right of appeal is confined expressly as against the order refusing to set aside the abatement of a suit. The reasoning is that if the intention was that the right of appeal should be available against an order refusing to set aside abatement of appeals the legislature could have so provided by adding the word 'appeal' at the end of the clause (k).

(7) I have taken into consideration the two sets of view expressed by the various courts but in view of the Supreme Court judgment in *Ct. A. Ct. Nachiappa Chettiar and others*, (Supra) it seems to me that the word 'suit' in clause (k) includes the appeal. In other words, I am of the view that an appeal lies from an order refusing to set aside the abatement of an appeal and that the word 'suit' in clause (k) includes an appeal.

(8) The lower court has held that the application for substitution under Order 22 rule 3 of the Code was filed on 29th November, 1977 while the period of limitation for filing such an application expired on 28th November, 1977. Had the application been filed on 28th November, 1977 there would not have been any difficulty and the appellants would have been substituted. In fact, the application, however, was filed on 29th November, 1977 for the reasons mentioned by the appellants in their subsequent application under Order 22 rule 9 of the Code which is dated 6th October, 1978. The application under rule 9 is no doubt barred by time as the appeal abated on 28th November, 1977 and the period of limitation for filing an application to set aside an abatement of an appeal is 60 days from the day of abatement under Article 121 of the Limitation Act. The lower court has also dismissed both the applications as barred by time. It was also observed that as reasons for not filing the first application for substitution within time are not mentioned therein, there was no ground to set aside the abatement. Learned counsel for the appellants submits that the lower court has misread the judgment in *Bachan Rao and others v. The Gram Panchayat Jonda through Jit Singh Sarpanch and others*, Air 1971 P &H; 243. The lower court has held that the reasons to set abatement were to be given in the application for substitution. The Punjab and Haryana High Court in the said judgment, however, accepted the reason filed before the High Court itself. In other words, it appears from the report that no reason for not filing the application for substitution within time was pleaded in the application for substitution. It was observed that evidence about the sufficient cause for delay can be produced in the appellate court and the abatement can be set aside if the application is made within 60 days from the date of abatement and the court is satisfied about the Explanation. In *Union of India v. Kundan* :

AIR1977Delhi38 the Division Bench observed that the application for substitution may in substance be for setting aside abatement and referred to the case of Bachan Ram and others (Supra). Thus it appears to me that if an application for substitution is not filed within a period of 90 days from the date of death of a party to the litigation but is filed before the expiry of 60 days from the date of abatement within the meaning of Article 121 of the Limitation Act, the application for substitution may be treated as an application for setting aside abatement. It also appears that the reasons for not filing the application for substitution within the limitation period may be enquired into by the court and if satisfied the abatement may be set aside. In Kirpa Ram v. Bhagat Chand & others, Air 1928 Lahore 746 it is observed that under Order 22 rule 9 of the Code the application is to set aside abatement and though as a matter of practice the applicant should state in the application that he was prevented by some sufficient cause from continuing the suit, it is not legally necessary that he should do so. It is further observed that the applicant should satisfy the court that there was a sufficient cause. In that case an application for substitution was treated as an application under Order 22 rule 9 of the Code and was allowed on proof of sufficient cause for the delay. Learned counsel for the respondents on the other hand submits that an applicant must give reasons in his application for setting aside abatement. In other words, he means to say that if an application for substitution is to be treated as an application for setting aside an abatement it can be treated as such only if reasons for not filing an application for substitution within time are mentioned therein. He relies upon Ata-ur Rahman and others v. Mashkur-un-Nisa and others, Air 1926 Lah 474. But I find from the report that an application purporting to be under Order 22 rule 4 might in particular cases be treated as one in substance under Order 22 rule 9 of the Code. In the particular facts of that case the abatement was however not set aside. The Supreme Court in Union of India v. .Ram Charan (deceased) through his legal representatives, : [1964]3SCR467 has observed that the court should not readily accept whatever the appellant alleges to explain his default but should scrutinise it and that court would be fully justified in considering the merits of the evidence led to establish the cause for the applicant's default in applying within time for the impleading of the legal representatives of the deceased. Thus it seems that it is for the court to satisfy itself whether there was sufficient cause which prevented the appellant from applying for substitution within time and if the court feels satisfied it seems that the court has to set aside the abatement.

(9) In the instant case, it seems that the lower court has not appreciated in a proper manner the judgment reported as Bachan Ram and others, (Supra), it is on record that the application, for bringing the legal representatives on record is dated 28th November, 1977 and bears the court fee stamp dated 28th November, 1977. From the subsequent application dated 6th October, 1978 supported by an affidavit, I am satisfied that the application for substitution was got typed on the morning of 28th November, 1977 that one of the appellants Ramesh Sharma took the same to his house to obtain signatures of his mother and others but developed pain in his abdomen and that was confined to house till 3.30 P.M. and thereafter he got the signatures of all the heirs on the application and reached the court at about 4.30 P.M. when the Reader told him to file the application on the next date as the appeal was also fixed for that date. There is general denial in the reply on behalf of the respondents. But after going through the application, I am satisfied that there was no intention on the part of the appellants for not filing the application for substitution on 28th November, 1977 and that cause has been explained in the application dated 6th October, 1978. I am, therefore, of the view that the lower court was in error in refusing to set aside the abatement of the appeal.

(10) For the reasons given above, I accept this appeal and set aside the impugned order. The abatement of the appeal before the lower appellate court is set aside and the appellants are substituted in place of the deceased Misri Lal. The first appeal of the appellants challenging the decree dated 20th April, 1977 before the Additional District Judge is, therefore, remanded for decision in accordance with law. Parties are directed to appear before the lower appellate court on 20th April, 1981. There would be no order as to costs in this appeal.

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