

Before J. V. Gupta, J.

SHALINDER SINGH,—Petitioner.

versus

SMT. JAI KAUR AND OTHERS,—Respondents.

Civil Revision No. 902 of 1984.

May 3, 1985.

Code of Civil Procedure (V of 1908)—Order 22 Rule 4 as amended by the Punjab and Haryana High Court—Death of a defendant during the pendency of a suit—Counsel for the deceased defendant—however, continuing to appear—Counsel later withdrawing from the suit after the amendment of Rule 4—Court proceedings ex-parte against the legal representatives of the deceased holding the plaintiff to be under no obligation to bring the legal representatives on record in view of the amendment—Suit decreed ex-parte—Decree passed after the death of the defendant—Whether an absolute nullity—Abatement if any—Whether to be set aside in such circumstances.

Held, that if the legal representatives are not brought on the record even then, that itself, did not make the *ex-parte* decree a nullity. A decree passed after the death of a party to the suit or appeal is not an absolute nullity. Such a decree is not void nor is it open to collateral attack but it is erroneous and liable to be set aside. The mistake can be rectified if the Court sets aside the proceedings taken after the death of the deceased party and directs that the case be retried in the presence of his legal representatives from the stage which it had reached immediately before the date of the death. This procedure places all the parties to the litigation in the same position in which they would have been if the legal representatives had been impleaded at the proper time.

(Para 5)

Held, that even if it be assumed that the suit had abated automatically on the expiry of the period for not bringing on record the legal representatives of the deceased defendant, it would be a fit case where the time could be extended for setting aside the abatement as for the first time it was brought to the notice of the Court after the amendment to Rule 4 of Order 22 of the Code of Civil Procedure, 1908 had come into force that the defendant had died. Knowledge thereof could be imputed to the plaintiff from that date only but thereafter the plaintiff was not required to move the application as directed by the Court. Under the circumstances, no fault could be found with the plaintiff for not bringing the legal representatives of the deceased defendant on record within time.

(Para 6)

Shalinder Singh v. Smt. Jai Kaur and others (J. V. Gupta, J.)

Petition under Section 115 CPC, for revision of the order of the Court of Shri R. K. Tyagi PCS, Sub Judge Ist Class, Patiala(B), dated 29th November, 1983 accepting the applications and setting aside the ex parte decree dated 16th December, 1975.

D. V. Sehgal, with B. R. Mahajan, Advocate, for the Petitioner.

M. S. Jain, with R. M. Gupta, Advocate, for the Respondents
No. 3 to 5.

JUDGMENT

J. V. Gupta, J.

(1) This order will dispose of Civil Revision Petitions Nos. 451 and 902 of 1984, as both of them have been filed against the common order of the executing Court dated November 29, 1983.

2. Shalinder Singh, petitioner, filed the suit for declaration and possession of the agricultural land against Kehar Singh and Devinder Singh. Devinder Singh was proceeded *ex parte* whereas Kehar Singh contested the said suit. During the pendency of the said suit, Kehar Singh died on October 31, 1973. In spite of that, counsel for Kehar Singh continued to appear on the subsequent dates. It was on March 24, 1975, when he made a statement in the Court that Kehar Singh had since expired and that his presence be not marked. On this statement, the case was adjourned to April 5, 1975, to enable the plaintiff to file the application for bringing on record his legal representatives. However, thereafter, the case was adjourned from time to time. On July 23, 1975, the trial Court passed the following order,—

“Present *c.f.* the plaintiff.

On 24th March, 1975 Shri Sukhdev Singh counsel for the defendant No. 1 made a statement that his client defdt. No. 1 has since died and he wanted adjournment to move an application to bring the L.Rs. on record of the said deceased defdt. Till today no appl. has been filed by either of the parties. But in view of the amendment in the C.P.C. by our own Hon'ble High Court it is the duty of the heirs of the deceased to bring on the record the L.Rs. of the deceased as per provision of new added rule 2-B of Order 22. Therefore in view of the said provision of law plaintiff is not bound to move an application for bringing the LRs on record of the deceased defdt.

Today none is present on behalf of the either of the surviving defendants. Hence they are proceeded against *ex parte*.

To come up on 14th August, 1975 for *ex parte* evidence."

Ultimately, the suit was decreed *ex parte* on December 16, 1975. The execution of the said decree was sought on May 29, 1976. To the said execution, objections were filed on behalf of the legal representatives of Kehar Singh as well as Devinder Singh who was proceeded *ex parte*. The executing Court,—*vide* order dated December 15, 1976, dismissed the execution application. However, in appeal, the case was remanded to the executing Court,—*vide* order dated September 26, 1979. It was directed that after framing the necessary issues and allowing the parties to lead evidence, the objection petition be decided in accordance with law. This time, necessary issues were framed by the executing Court. It was found that Kehar Singh had died on October 31, 1973. The *ex parte* decree against him was liable to be set aside as his legal representatives were not brought on the record within time and, thus, the suit will be deemed to have abated. Since the *ex parte* decree was passed at the back of his legal representatives, the same could not bind them as they were not given the opportunity of being heard. Not only that, even the objections filed on behalf of Devinder Singh who was proceeded *ex parte* were also allowed and the *ex parte* decree against him was also set aside. Thus, while accepting the objection petition filed on behalf of the judgment-debtors, the executing Court also set aside the *ex parte* decree dated December 16, 1975, as well. Dissatisfied with the said order, the decree-holder Shalinder Singh filed Civil Revision Petition No. 451 of 1984 whereas Baboo Singh and others, legal representatives of Kehar Singh, deceased, have filed Civil Revision Petition No. 902 of 1984.

3. According to the learned counsel for Baboo Singh and others, after accepting the objection petition filed on their behalf, the executing Court could not set aside the *ex parte* decree and that the said direction in the impugned order was without jurisdiction. In the revision petition filed on behalf of Shalinder Singh, it was submitted that in view of Sub-rule (4) as substituted by this Court in Order XXII rule 4, Code of Civil Procedure, which was published on March 18, 1975 and came into force with effect from April 11, 1975, it was the duty of the counsel for the deceased defendant to bring on the record, his legal representatives and as he failed to do so, the trial Court rightly passed the order dated July 23, 1975 and, therefore, the *ex parte* decree could not be held to be nullity. It was a valid decree passed by a competent Court. In any case, argued the

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learned counsel, even if the legal representatives are to be allowed an opportunity for being brought on the record, in that situation, the parties should be relegated to the position which existed on July 23, 1975, when the trial Court passed the order re-produced in the earlier part of this judgment, and that the suit be decided on merits in accordance with law.

4. On the peculiar facts and circumstances of this case, I am of the considered opinion that in view of the order of the trial Court dated July 23, 1975, the parties should be relegated to the position as it existed on that day and the trial Court be directed to further proceed with the suit in accordance with law after bringing the legal representatives of Kehar Singh, deceased, on the record. It is well established that no one is to suffer for a fault on the part of the Court. It is the common case of the parties that in spite of the fact that Kehar Singh defendant had died on October 31, 1973, his counsel continued to appear on the subsequent dates in the trial Court. It was for the first time on March 24, 1975, when it was stated by him that Kehar Singh, defendant, had died and, therefore, his presence be not marked. In that situation, the plaintiff could bring an application for bringing his legal representatives on record but for the order dated July 23, 1975. The limitation, if any, in this behalf, will start from March 24, 1975, and not earlier. The trial Court,—*vide* order dated July 23, 1975, observed that the plaintiff was not bound to move the application for bringing the legal representatives of the deceased defendant on record in view of the amendment in the Code of Civil Procedure by this Court. The said order was passed within four months of the statement dated March 24, 1975, made by the counsel for Kartar Singh, defendant. Under the circumstances, it will be a futile exercise to leave the question open whether the abatement should be set aside or not at this stage. Since, now the parties are before the Court, it will be in the interest of justice that the matter is decided on merits in accordance with law after hearing both the parties.

5. It will not be out of place to mention here that if the legal representatives were not brought on the record, even then, that itself, did not make the *ex parte* decree a nullity. It was held in *Tota Ram v. Kundan*, (1) that a decree passed after the death of a party to the suit or appeal is not an absolute nullity. Such a decree is not void nor is it open to collateral attack but it is erroneous and liable to be set aside. The mistake can be rectified if the Court sets aside the

(1) A.I.R. 1928 Lahore 784.

proceedings taken after the death of the deceased party and directs that the case be retired in the presence of his legal representative from the stage which it had reached immediately before the date of death. This procedure places all the parties to the litigation in the same position in which they would have been if the legal representative had been impleaded at the proper time. The decision in the above-said case was followed by this Court in *Birbal v. Harlal*, (2) and *Ram Kishan v. Kartar Singh*, (3).

6. The learned counsel for the legal representatives of Kehar Singh, however, contended that as a matter of fact, the suit had already abated in the year 1973 when the said defendant had died on October 31, 1973 and that in such a situation, the amendment in rule 4 of Order XXII of the Code of Civil Procedure by this Court, as noticed earlier, was of no consequence as the same was not retrospective in operation. Though this contention raised on behalf of the learned counsel *prima facie* seems to be plausible; yet from the facts and circumstance of this case, it appears, that it cannot stand scrutiny. It is the common case of the parties that in spite of the death of Kehar Singh, defendant, on October 31, 1973, his counsel continued to appear in the trial Court on subsequent dates and it was only on March 24, 1975, when it was stated for the first time in the Court by him that Kehar Singh, defendant, had died and that his presence may not be marked. Meanwhile notification dated March 18, 1975, amending rule 4 of Order XXII of the Code of Civil Procedure, had been published in the official Gazette which came into force with effect from April 11, 1975. It was on account of the said amendment in Order XXII of the Code, that the trial Court passed the order dated July 23, 1975. Thus, on these facts, it could not be successfully argued that the suit had already abated in the year 1973, on the death of Kehar Singh, defendant. *Lakhi v. Sham Lal*, (4) and *Ramji Lal v. Hira*, (5) relied upon by the learned counsel, in support of the contention, have no applicability to the facts of the present case, and, are, therefore, distinguishable. In any case, even if it be assumed that the suit had abated automatically on the expiry of the period for not bringing on record the legal representatives of Kehar Singh, defendant, it is a fit case where the time could be extended for setting aside the abatement as for the first time, it was brought to the notice of the Court on March 24, 1975

(2) A.I.R. 1953 Punjab 252.

(3) A.I.R. 1969 Punjab & Haryana 214.

(4) 1981 Revenue Law Reporter 373.

(5) 1983 Punjab Law Reporter 231.

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that the said Kehar Singh had died. Knowledge thereof could be imputed to the plaintiff from that day only, but on July 23, 1975, the plaintiff was not required to move the application as directed by the trial Court. Under the circumstances, no fault could be found with the plaintiff for not bringing the legal representatives of Kehar Singh deceased defendant on record within time. Besides, he sought the execution of the *ex parte* decree passed in his favour immediately. Since then, the matter is pending in the executing Court.

7. Taking into consideration all the facts and circumstances of the case, I am of the considered opinion that in order to do justice between the parties, they be relegated to the position as it existed on March 24, 1975, after bringing the legal representatives of Kehar Singh, deceased, on record, after setting aside the *ex parte* decree dated December 16, 1975. The parties have been directed to appear in the trial Court on May 27, 1985. It is further directed that the parties will lead their evidence at their own responsibility. However, *dasti* summons may be given to them under Order XVI rule 7-A, Code of Civil Procedure, if so desired. These revision petitions are disposed of accordingly.

N.K.S.

Before P. C. Jain, A.C.J. & I. S. Tiwana, J.

STATE OF HARYANA AND ANOTHER,—Appellants.

versus

SHRI OM PARKASH AND OTHERS,—Respondents.

Letters Patent Appeal No. 1055 of 1984.

May 20, 1985.

Haryana Rural Development Fund Act (XII of 1983)—Sections 3 and 4—Act imposing cess on sale proceeds of agricultural produce bought or sold or brought for processing in Notified Market Area—Such cess payable by the dealer—Cess so collected constitutes a separate development fund—Purposes for which fund is to be expended specified in section 4(5)—Such imposition—Whether a fee—Element of quid pro quo—Direct benefit or service to the payers of the cess—Whether essential.

* *Held*, that co-relationship expected between the levy and the services rendered is one of general character and not of mathematical