

Decree of Divorce by mutual consent is passed in favour of the parties. Their marriage stands dissolved forthwith.

(3) The Revision Petition is disposed of accordingly.

H.S.B.

Before J. V. Gupta, J.

HARBANS LAL AND OTHERS,—*Petitioners.*

versus

INDER CHAND AND OTHERS,—*Respondents.*

Civil Revision No. 1809 of 1985

November 18, 1985.

Code of Civil Procedure (V of 1908)—Order 22 Rules 5 and 9 and Order 43 Rule 1(k)—Application filed to bring on record legal representatives of a deceased plaintiff—Application dismissed and suit also dismissed as having abated—Appeal against such orders—Whether maintainable.

Held, that where the trial Court dismissed the suit as having abated as a consequence of the application for bringing the legal representatives on record having been dismissed, the appeal is maintainable against the orders passed by the Court. It has been specifically provided in Rule 1(k) of Order 43 of the Code of Civil Procedure 1908 that an appeal would lie against an order passed under Order 22 Rule 9 refusing to set aside abatement or if the suit has been dismissed as abated. Rule 9 of Order 22 clearly contemplates that where the suit abates or is dismissed under this order, no fresh suit shall be brought on the same cause of action and such an order dismissing the suit as abated has been made appealable under Order 43 rule 1(k). Thus, for all intents and purposes the order passed by the trial Court dismissing an application of the legal representatives of the plaintiff and the consequent dismissal of the suit as having abated was an order under Rule 9 of Order 22.

(Para 3).

Petition under section 115 C.P.C. for Revision of the order of the Court of Shri S. S. Sohal, Additional District Judge, Patiala dated 11th March, 1985 reversing the order of Shri U. S. Momi, P.C.S. Sub Judge, IInd Class, Rajpura dated 8th June, 1982 accepting the appeal and setting aside the impugned orders appealed against and remanding the case to the trial court i.e. his successor as Mr. Momi now stands

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transferred for passing a fresh order on the application moved by the legal representatives of Des Raj deceased and in the suit in accordance with the law after allowing the parties to lead evidence if need be and further ordered both the parties are directed to appear before the Sub Judge Rajpura on 1st April, 1985.

J. R. Mittal & Pawan Bansal, Advocates, for the Petitioners.

P. N. Arora, Advocate, for Respondent Nos. 2 to 8.

JUDGMENT

J. V. Gupta, J.

(1) Inder Chand and others, plaintiff-respondents, filed a suit for declaration to the effect that mutation No. 11427, dated 18th August, 1978, of the part of land measuring 85 Kanals 11 Marlas, is null and void and ineffective against the rights of the plaintiffs, and for permanent injunction restraining the defendants from interfering with their possession and lawful cultivating possession. During the pendency of the suit, one of the plaintiffs Des Raj died. So, an application dated 13th May, 1982, was filed by Smt. Lajo, the widow; Karam Chand, Dharam Pal, Ram Pal, minor sons of Des Raj deceased, and Kamla and Palo, his daughters, for being impleaded as his legal representatives. This application was contested by the defendants, *inter alia*, on the ground that it was barred by time. The learned Sub Judge found that the application filed by Smt. Lajo, etc., was not in accordance with the Rules and Orders framed by the Punjab and Haryana High Court, and was, thus, liable to be dismissed. Consequently, he dismissed the application,—*vide* order dated 8th June, 1982, and in the result the suit was also dismissed,—*vide* separate orders of the same date, having abated due to the death of Des Raj, plaintiff. Dissatisfied with the same, the plaintiffs filed an appeal against the aforesaid orders of the trial Court. The learned Additional District Judge accepted the appeal, set aside the impugned orders appealed against and remanded the case to the trial court for passing a fresh order on the application moved by the legal representatives of Des Raj deceased in accordance with law, after allowing the parties to lead evidence, if necessary. Dissatisfied with the same, the defendants have filed this petition in this Court.

(2) At the time of motion hearing it was contended on behalf of the petitioners that the appeal before the lower appellate court

was not competent against the orders under Order 22, Rules 3 and 5 of the Code of Civil Procedure. In these circumstances, the only question to be decided in this petition is whether the appeal before the lower appellate court against the orders of the trial court dismissing the suit having abated, was maintainable or not. According to the learned counsel, since the application filed on behalf of the legal representatives of the deceased plaintiff Des Raj was dismissed under O.22, R.5, no appeal, as such, was competent against the said order. According to the learned counsel, the appeal provided under O.43 R. 1(k) is only against an order under R. 9 of O. 22, refusing to set aside the abatement, and, therefore, no appeal, as such, against the order dismissing the application for bringing the legal representatives on record was competent. In support of his contention, he referred to *Madan Naik vs. Mst. Hansubala Devi* (1), *Shri Shiv Idol Shiv Mandir vs. Sanatam Dharam Pritinidhi Sabha* (2) and *Des Raj vs. Om Parkash* (3).

(3) After hearing the learned counsel for the parties and going through the case law cited at the Bar, I do not find any merit in this petition. It is the common case of the parties that the trial court dismissed the suit as abated as a consequence of the application for bringing the legal representatives on record having been dismissed. The plaintiffs filed an appeal against the said orders before the lower appellate court. Such an appeal was maintainable in view of O.43, R 1(k) which provides as under:—

“1. *Appeals from orders*:—An appeal shall lie from the following orders under the provisions of Section 104, namely:—

x x x x

(k) an order under Rule 9 of Order XXII refusing to set aside the abatement or dismissal of a suit.”

Thus, it has been specifically provided therein that an appeal will lie against an order passed under O. 22 R. 9, refusing to set aside the abatement or if the suit has been dismissed as abated. In the present case, the plaintiffs filed the appeal against the order of the

(1) A.I.R. 1983 S.C. 676.

(2) 1976 P.L.R. 589.

(3) 1985 R.L.R. 401.

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trial court dismissing their suit as abated. In that appeal, of course, they also challenged the order passed on their application for bringing them on the record as the legal representatives of the deceased plaintiff Des Raj. In none of the authorities cited at the Bar has this question been decided as such. In the Supreme Court judgment referred to above, the question was as to whether the order dismissing the suit having abated amounts to a decree or not, and whether second appeal against such decree is competent or not. The answer to the question was that no second appeal was competent because the order dismissing the suit as abated was appealable under O. 43 R. 1(k), and no second appeal lay against an order. In the case *Shri Idol Shiv Mandir* (supra), there is nothing to show that any order dismissing the suit having abated was passed or whether any appeal against the said order was filed or not and, therefore, the said case has no relevance to decide the present controversy between the parties. As a matter of fact, O. 22 R. 5 is not at all relevant and is not attracted to the facts of the present case. Under the said rule, the question to be determined is as to who is the legal representative of the deceased party. If the Court decides in favour of one party and against the other, in that situation such an order may not be appealable but R.9 of O. 22 clearly contemplates that where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action, and such an order dismissing the suit as abated has been made appealable under O.43 R. 1(k). Thus, for all intents and purposes, the order passed by the trial court dismissing the application of the legal representatives of Des Raj deceased, and the consequent dismissal of the suit as abated was an order under O. 22 R. 9. In this view of the matter, the petition fails and is dismissed with costs. The parties, through counsel, are directed to appear in the trial Court on 20th December, 1985.

N.K.S.

Before S. P. Goyal & G. C. Mittal, JJ.

STATE OF PUNJAB,—Appellant.

versus

MOHAN SINGH MALHI,—Respondent.

Civil Misc. No. 1893 of 1985 in L.P.A. No. 552 of 1968.

November 26, 1985.

Code of Civil Procedure (V of 1908)—Sections 144 and 151—
Constitution of India 1950—Article 226—Petition of an employee