

**IN THE HIGH COURT OF JAMMU & KASHMIR AND
LADAKH AT SRINAGAR**

Reserved on: 12.06.2023
Pronounced on: 11.07.2023

CR No.11/2022

MOHAMMAD RAFIQ KHAN & ORS. ...PETITIONER(S)

Through: - Mr. M. A. Qayoom, Advocate.

Vs.

PUNJAB NATIONAL BANK & ORS ...RESPONDENT(S)

Through: - Mr. N. A. Dendroo, Advocate.

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1) The instant revision petition is directed against order dated 29.11.2022 passed by learned Additional District Judge (Bank Cases), Srinagar, whereby application of the plaintiff (respondent No.1 herein) for restoration of the suit has been allowed.

2) It appears that respondent No.1/plaintiff Bank had filed a suit for recovery of an amount of Rs.3,44,945.80 against the petitioners and proforma respondents before the learned trial court. It also appears that during pendency of the suit, the plaintiff bank stopped appearing in the case and the suit was dismissed for non-prosecution on 29.08.2014.

3) The plaintiff filed an application for restoration of the suit

before the trial court on 29th March, 2016, on the ground that the

counsel for the plaintiff bank had wrongly diarized the date of hearing in his records, as a result of which he could not appear on the date of hearing. It was also averred in the application that the counsel for the plaintiff was not correctly informed by his associate about the court proceedings, as a result of which he remained ignorant about the same. In the month of December, 2015, counsel for the plaintiff is stated to have acquired the knowledge about dismissal of the suit and after obtaining certified copy of the order of dismissal in the month of February, 2016, the application for restoration was filed. It has also been averred that the record of the case lying with the counsel for the plaintiff was damaged in the floods of September, 2014, and he had to reconstruct the same. On these grounds, the plaintiff sought condonation of delay in filing the application for restoration as well as for restoration of the suit.

4) It seems that the petitioners/defendants were served with the summons of the application, but nobody caused appearance on their behalf before the trial court. On 26.06.2019, the learned trial court, after noting the aforesaid facts, proceeded to hear *ex parte* arguments of the plaintiff. On the next date i.e., on 15.07.2019, counsel for the petitioners/defendants appeared before the trial court and filed his Vakalatnama and the petitioners were permitted to file objections to the application, but the objections were not filed by them despite availing a number of opportunities. Ultimately on 29.11.2021, the

learned trial court, after hearing counsel for both the parties, passed the impugned order and restored the suit to its original number after condoning the delay in filing the application for restoration subject to payment of cost of Rs.3000/.

5) The petitioners have challenged the impugned order on the ground that respondent No.3 (defendant No.5 in the suit) had died on 19.02.1997 whereas respondent No.4 (defendant No.6 in the suit) had died on 26.08.2008 and since no steps were taken by the plaintiff to implead their legal heirs as party/defendants, as such, the suit against them had already abated. On this ground, it is urged that the suit could not have been restored. It has been averred that respondent No.5 (defendant No.7 in the suit) had also died on 16.06.2021 during the pendency of the restoration application and his legal heirs were not brought on record. It is contended that the impugned order has been passed against dead persons whose legal heirs were not brought on record, as such, the same is nullity in the eyes of law. It has also been contended that the application for restoration of the suit was filed by the plaintiff after one year and seven months of dismissal of the suit and, as such, the same was hopelessly barred by time. There was no explanation from respondent No.1/plaintiff in its application for restoration of the suit with regard to aforesaid delay in filing the application. It is contended that this aspect of the matter has not been properly appreciated by the learned trial court while allowing the application for restoration of the suit.

6) I have heard learned counsel for the parties and perused the grounds of revision, the impugned order and record of the trial court.

7) Learned counsel for the petitioners, Mr. M. A. Qayoom, has vehemently argued that since the suit as against respondents No.3 to 5 had abated because of their death and non-impleadment of their legal heirs, therefore, the suit could not have been restored to its original number. In this regard, learned counsel has relied upon the judgments of the Supreme Court in the case of **Madan Naik vs. Mst. Hansubala Devi and others**, (1983) 3 SCC 15. Reliance has also been placed upon the judgment of this Court in the case of **Ali Mohd. Khan vs. Vijay Tulsi**, 1985 SLJ 358, as also the judgment of the Supreme Court in the case of **Gurnam Singh vs. Gurbachan Kaur**, (2017) 13 SCC 414.

8) So far as death of defendants No.5 to 7 is concerned, the same is not in dispute. However, the record of the trial court shows that the legal heirs of defendant No.5 have been brought on record in terms of order dated 06.04.2005 passed by the trial court wherein it has been observed that the legal heirs of defendant No.5 are already on record in their capacity as defendants No.2, 3, 4 and 6. However, so far as deceased defendants No.6 and 7 are concerned, who happen to be respondents No.4 and 5 to the present proceedings, their legal heirs have not been brought on record, either when the suit was pending before the trial court or during the pendency of the restoration

application. The question that arises for consideration is as to whether the provisions contained in Order XXII of the Civil Procedure Code, which govern the procedure for bringing on record the legal representatives of the deceased plaintiffs/defendants as also the procedure for setting aside of the abatement, are applicable to the proceedings relating to restoration of the suit.

9) In all the provisions contained in Order XXII of the Code of Civil Procedure, the expression used is 'plaintiff/plaintiffs or defendant/ defendants', which shows that the provisions contained in Order XXII of the CPC relate to proceedings in a suit. However, Rule 11 of the said Order provides that in the application of the said Order to appeals, the word "plaintiff" shall be held to include an appellant, and the word "defendant" a respondent, and the word "suit" an appeal, meaning thereby that these provisions are applicable even to appeals.

10) Section 141 of the Code makes procedure provided under the Code in regard to suits applicable to all proceedings in any court of civil jurisdiction. Explanation to the said provision lays down that expression 'proceeding' would include the proceedings under Order IX of the Civil Procedure Code. Thus, the provisions contained in Order XXII of the CPC are applicable to the proceedings relating to restoration of a suit which falls under Order IX of the Code.

11) As has already been noted, neither the legal heirs of defendant

No.6 nor the legal heirs of defendant No.7 have been brought on

record as the plaintiff has not taken any steps for doing so. It appears from a perusal of the trial court record that it is only on 12.05.2022 that the learned counsel for the defendants has informed the trial court about the death of defendants No.6 and 7 when the present revision petition was pending before this Court. It is not clear whether or not the plaintiff was ignorant about the death of defendants No.6 and 7 until 12.05.2022. If that is so, then in terms of Order XXII Rule 4(5) of the CPC, the plaintiff has a remedy of filing an appropriate application before the trial court for setting aside the abatement and for bringing on record legal representatives of defendants No.6 and 7.

12) Be that as it may, Rule 2 of Order XXII of the CPC provides that where the right to sue survives against the surviving defendant or defendants alone, the suit can proceed against the surviving defendant or defendants. The question that falls for determination in this case is as to whether the right to sue against the petitioners herein survives in favour of the respondent No.1-plaintiff bank even if it is assumed that the suit as against defendants No.6 and 7 has abated.

13) If we have a look at the plaint, the plaintiff has sued defendants No.1 to 5 as principal borrowers whereas defendants No.6 and 7 have stood as guarantors for repayment of the loan. The liabilities sought to be enforced against the defendants are, therefore, joint and several. It is a well settled position of law that separate suits can be filed against principal debtor and various guarantors and it is well within the right

of the plaintiff not to sue any of the guarantors and if any such guarantor is left out, the principal borrower or the guarantor, against whom the suit has been filed, cannot make any grievance and the suit can legitimately be prosecuted against rest of the persons.

14) In the instant case, the plaintiff bank has sued defendants No.1 to 5 in their capacity as principal borrowers and it is well within its competence to seek recovery of the loan amount along with interest from the principal borrowers leaving out the guarantors. Therefore, even if suit stands abated as against defendants No.6 and 7, who are the guarantors, still then plaintiff's cause of action as against defendants No.1 to 5 would survive. The suit, as such, cannot abate. The argument of learned counsel appearing for the petitioners that the suit as a whole would abate is without any substance and is bound to be rejected. He may be right in arguing that once an application for bringing on record legal representatives of a deceased defendant is not made without the prescribed period of limitation, the suit as against the said defendant would abate automatically but having regard to the nature of the instant suit, it may have abated against defendants No.6 and 7 but the cause of action in favour of the plaintiff bank to sue defendants No.1 to 5, who happen to be the principal borrowers, does not come to an end with the death of defendants No.6 and 7.

15) That takes us to the argument as to whether the plaintiff bank has been able to show sufficient cause for restoration of the suit and

for condonation of delay in filing the restoration application. It is true that limitation for filing an application for restoration of the suit starts to run from the date of passing of the order of dismissal, but in the instant case learned counsel for the plaintiff has submitted that due to wrong entry in his diary he could not appear in the case when it was called out for hearing. It has been further averred that due to the devastating floods of September 2014, the record in the office of the counsel got damaged and he had to reconstruct the same after getting the knowledge about the dismissal of the suit, which caused delay in filing the application for restoration of the suit. The application is supported with personal affidavit of the counsel and no reply to the application has been filed by the petitioners/defendants before the trial court despite availing a number of opportunities. The assertions of the plaintiff bank in this regard have, therefore, remained un rebutted.

16) It is a fact of common knowledge that due to devastating floods of September 2014, in Srinagar city large scale damage was caused to infrastructure, houses, offices, court complexes and commercial establishments. It is also a fact of common knowledge that the court records in court complexes as well as in the offices of the counsels suffered damage and had to be reconstructed. Even the court functioning was disrupted, and it took several months to restore the normal functioning of the courts in Srinagar City. Therefore, the assertion of the counsel for the plaintiff that the record in his office

got damaged and the same had to be reconstructed cannot be brushed aside, particularly in absence of any rebuttal to the same.

17) Having regard to the facts and circumstances, which were prevalent at the relevant time, it appears that the plaintiff bank has made out a sufficient cause for not filing an application for restoration within the prescribed time as also for not appearing before the court when the case was dismissed for non-prosecution.

18) This Court, while exercising its revisional jurisdiction, can interfere in an order passed by a subordinate court if such court appears to have exercised jurisdiction not vested in it by law, or it appears to have failed to exercise jurisdiction so vested in it or it has acted in exercise of its jurisdiction illegally or with material irregularity. The revisional jurisdiction cannot be exercised to cover either an error of fact or error of law.

19) In the instant case, the learned trial court has exercised its discretion of condoning the delay in filing the restoration application and in restoration of the suit. Having regard to the facts and circumstances discussed hereinabove, I do not find any illegality or irregularity having been committed by the learned trial court while exercising its jurisdiction in restoring the suit to its original number. Therefore, this is not a fit case warranting interference from this Court in exercise of its revisional jurisdiction against the impugned order

passed by the learned trial court. The revision petition lacks merit and is dismissed accordingly.

20) The trial court record along with a copy of this judgment be sent to the trial court.

**(Sanjay Dhar)
Judge**

**Srinagar,
11.07.2023
"Bhat Altaf, PS"**

Whether the order is speaking: Yes/No
Whether the order is reportable: Yes/No

