

also beyond doubt. But it seems innocuous that the Central Government having put these helping agencies to achieve its objects, should have over-looked to provide such an exemption as conceived of in the proviso to Clause 13-B of the Control Order. In this situation, when the petitioners have acted on the directions of the Government of India to dispose of fertilizers which turned out to be substandard on analysis (it is nobody's case that the fertilizers was substandardised further to what it was imported, should the petitioners be made to suffer merely because the petitioners cannot lay hands on such exemption or the State prosecuting them shrugs its shoulders not to detect, if there is any? It is equally beyond doubt that the Central Government has ample power under the Act and the Control Order to issue orders and exemptions so as to carry out the purposes of the Act. The primary purpose of the Act is to maintain increased supplies of any essential commodity or for securing its equitable distribution and availability at fair prices. Punishment of offenders, standing in the way of such primary object, is a matter ancillary. In a matter like the present one, in launching and pursuing the prosecution, the State has in the first instance categorically to state that the Central Government had not made any such exemption to do away with the requirements before disposal of non-standard fertilizers could be resorted to by the petitioners and that too at the instance of the Central Government. In view of this apparent gap in the pursuit of prosecution and its faulty launching, I find it utterly unjust to let the prosecution continue against the petitioners. Thus, necessarily the proceedings against the petitioners need be and are hereby quashed, leaving it open to the prosecution to supply the requisite information in categorical terms whereafter the Magistrate may, if so advised, proceed afresh in accordance with law. In the situation, no other point need be considered.

(5) For the foregoing reasons, these petitions are allowed and the proceedings against the petitioners are quashed.

N.K.S.

Before J. V. Gupta, J.

ANANG PAL,—*Petitioner.*

versus

PEAREY LAL and others,—*Respondents.*

Civil Revision No. 1937 of 1985.

September 9, 1985.

Code of Civil Procedure (V of 1908)—Section 2(II) and Order 22 Rules 5 and 10—Application by a person for being impleaded as a

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legal representative of a deceased plaintiff—Such person laying claim on the basis of a will allegedly executed by the deceased in his favour—Application dismissed by the trial Court—Order of the Court—Whether deemed to have been passed under Rule 5 of Order 22—Appeal against such order—Whether competent.

Held, that Order 22 Rule 3 of the Code of Civil Procedure, 1908, provides for the procedure for an application for bringing on record the legal representatives in case of death of one of several plaintiffs or of sole plaintiff. According to the said provision whether one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, the court on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be a party and shall proceed with the suit. Rule 5 of the said Order provides for the determination of questions as to 'legal representative'. Where a person claimed himself to be the legal representative of the deceased by virtue of a will in his favour, then it could not be said that his application was decided under Order 22 Rule 10 of the Code. This rule contemplates the assignment, creation or devolution of any interest during 'the pendency of the suit' and it is clear that if a case is covered under Order 22 Rule 3 of the Code, then Rule 10 thereof would not be attracted. Rule 10 of Order 22 applies in altogether different situation and to persons other than legal representatives. Admittedly, there is no assignment, creation or devolution of any interest during the pendency of the suit in favour of the applicant who claimed himself to be a legal representative of the deceased. The order of the trial court dismissing his application could not be said to have been passed under Order 22 Rule 10 of the Code; rather it was passed under Rule 5 and, therefore, no appeal against the same was maintainable.

(Para 3)

Petition under Section 115 C.P.C. & Section 44 of the Punjab Courts Act read with Article 227 of the Constitution of India praying that the revision petition may please accepted, the orders of the lower appellate court be set aside and the orders of the trial court be restored dismissing the application of Pearey Lal—Respondent.

It is also prayed that this Hon'ble Court may please pass AND/OR any other appropriate order as deemed fit and proper in the fact and circumstances of the case.

Suresh Amba, Advocate, for the Petitioner.

Shri Ram Rang, Advocate, for the Respondent.

JUDGMENT

J. V. Gupta, J.—

Sahib Dayal and others filed the suit for declaration and for the grant of the permanent injunction on July 20, 1982. During the pendency of the said suit, Sahib Dayal, one of the plaintiffs died on

September 28, 1982. Pearey Lal, respondent, moved the application on December 21, 1983, for bringing him on record as his legal representative. It was alleged therein that Sahib Dayal, deceased, executed and got registered the will dated May 2, 1978, in respect of the land in suit, in his favour. Therefore, he was his legal representative and was, thus, entitled to be brought on the record as such. That application was contested on behalf of the defendants on the plea *inter alia* that Pearey Lal, respondent, was not his legal heir, nor any will was executed by him in his favour, as alleged. The trial Court framed the necessary issue as to whether Pearey Lal was the legal heir of deceased Sahib Dayal on the basis of the will dated May 2, 1978, as alleged. Ultimately, it found that the execution of the will in favour of the respondent by the said Sahib Dayal had not been proved and thus, Pearey Lal, applicant, did not become the legal heir of the deceased, as claimed. Consequently, the application filed by him was dismissed,—*vide* order dated October 6, 1984. Dissatisfied with the same, Pearey Lal filed appeal. Therein, a preliminary objection was raised on behalf of the defendants that the order passed by the trial Court was under Order XXII rule 5, Code of Civil Procedure, (hereinafter called the Code) and as such, no appeal was maintainable against the same. The only remedy available to him was to move this Court by way of revision petition. On behalf of Pearey Lal it was argued that the order by the trial Court had been passed under Order XXII rule 10 of the Code and as such, an appeal thereto was envisaged under Order XLIII rule 1 of the Code. The learned lower appellate Court came to the conclusion that the order of the trial Court will be deemed to have been passed under Order XXII rule 10 of the Code and, therefore, the appeal was maintainable. On merits, it reversed the finding of the trial Court and came to the conclusion that the execution of the will was duly proved and Pearey Lal was entitled to be impleaded as the legal representative of Sahib Dayal, deceased. Dissatisfied with the same, the defendant, has filed this revision petition in this Court.

(2) The main controversy between the parties in this revision petition is as to whether the order of the trial Court dismissing the application of Pearey Lal for impleading him as the legal representative of Sahib Dayal, deceased, was appealable or not.

3. It is not disputed that if the said order is held to have been passed under Order XXII rule 5 of the Code, then, no appeal was maintainable against the same but if the said order is held to be

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under Order XXII rule 10, then the appeal thereof was competent. Order XXII rule 3 of the Code, provides for the procedure for an application for bringing on record the legal representatives in case of death of one of several plaintiffs or of sole plaintiff. According to the said provision where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, the Court on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit. Rule 5 of the said Order provides for the determination of questions as to legal representative. The term "legal representative" is defined under section 2(11) of the Code, which is to the following effect,—

“ ‘legal representative’ means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued.

From the averments made in the application dated December 21, 1983, filed by Pearey Lal, it is clear that he claimed himself to be the legal representative of Sahib Dayal, deceased, by virtue of the will in his favour executed by him on May 2, 1978. On these facts, it could not be successfully argued on behalf of Pearey Lal, respondent, that his application was decided under Order XXII rule 10 of the Code. Rule 10(1) of the said Order reads—

“10. Procedure in case of assignment before final order in suit—(1) In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court be continued by or against the person to or upon whom such interest has come or devolved.”

The above-said rule contemplates the assignment, creation or devolution of any interest during “the pendency of a suit” and it is clear that if a case is covered under Order XXII rule 3 of the Code, then rule 10 thereof would not be attracted. Rule 10 of Order XXII applies to an altogether different situation and to persons other than legal representatives. Admittedly, in the present case, there was no assignment, creation or devolution of any interest during the pendency of the suit in favour of Pearey Lal, respondent, Rather he

claimed himself to be the legal representative of Sahib Dayal, deceased. In this view of the matter, the view taken, by the lower appellate Court was wrong and misconceived. The order of the trial Court could not be said to have been passed under Order XXII rule 10 of the Code; rather it was passed under Order XXII rule 5 and, therefore, no appeal against the same was maintainable.

(4) For the reasons recorded above, this revision petition succeeds and is allowed. The impugned order of the lower appellate Court is set aside and that of the trial Court dismissing the application of the respondent for bringing him on record as the legal representative of Sahib Dayal, deceased, is restored with costs. The parties are directed to appear in the trial Court on 10th October, 1985.

N.K.S.

Before B. S. Yadav, J.

PRESTOLITE OF INDIA LTD,—*Petitioner.*

versus

UNION BANK OF INDIA, AND OTHERS,—*Respondents.*

Civil Revision No. 3041 of 1984.

September 26, 1985.

Code of Civil Procedure (V of 1908)—Section 115 and Order 40 Rule 1—Application for appointment of a receiver in a pending suit—Hypothecation deed giving power to the creditor to appoint a receiver in case the debtor committed default in payment—Receiver—Whether could be appointed merely because there is a clause in the deed—Appointment of a receiver—Principles governing such appointment—Stated—Trial Court exercising discretion and appointing a receiver—Order upheld by the lower appellate court—Discretion exercised by the courts below—Whether could be interfered with by the High Court under Section 115.

Held, that the creditor might have a right to appoint a receiver, but if it seeks the help of the Court for appointment of a receiver, then the provisions of Order 40 Rule 1 of the Code of Civil Procedure, 1908, will have to be taken note of. That provision lays down that the receiver can be appointed only if it appears to the Court to be just and convenient. Therefore, the creditor cannot insist that a