petitioners were under the favourable consideration of the respondent—State and it was likely that the orders of termination passed against them may not be implemented or might, in fact, be withdrawn. On these premises at the last stage the learned counsel for the petitioners sought permission to withdraw the writ petition. In the peculiar situation and in order not to prejudice the case of the petitioners for reconsideration by the respondent—State, we, as a spcial case, are inclined to agree with this prayer.

(21) Civil Miscellaneous No. 1000 of 1978 is accordingly allowed and the petitioners are permitted to withdraw the case. There will be no order as to costs.

Prem Chand Jain, J.—I agree.

S. C. Mital, J.—I agree.

N. K. S.

FULL BENCH

Before S. S. Sandhawalia, C.J., S. C. Mital and R. N. Mittal, JJ.

CHAND KAUR—*Plaintiff-Appellant.*

versus

JANG SINGH AND OTHERS—*Defendants-Respondents.*

Civil Misc. No. 458-C of 1978 in Regular Second Appeal No. 565 of 1973.

August 21, 1978.

Code of Civil Procedure (V of 1908)—Section 122 and Order 22 Rules 2-A, 2-B and 4(3) as substituted by the Punjab and Haryana High Court—Code of Civil Procedure (Amendment) Act (104 of 1976)—Section 97—Sub-rule (3) of rule 4 of Order 22 as substituted by the High Court—Whether inconsistent with the provisions of the Amending Act and therefore, stands repealed.

Held, that the main purpose for addition of rules 2-A and 2-B and sub-rules (4), (5) and (6) to rule 4 of Order 22 of the Code of Civil Procedure, 1908 and substitution of sub-rule (3) to rule 4, was not that the legal representatives of the deceased defendant should

not be brought on the record. On the other hand its purposes was that if through over-sight or on account of some other cause, the legal representatives of the deceased defendant could not be brought on record before the decision of the suit, the decision given should remain binding on the parties. No doubt, section 97(1) of the Amendment Act provides that any amendment made or any provision inserted in the Code by a High Court before commencement of the Act shall, if it is inconsistent with the amended Code, stand repealed. But if a rule or sub-rule in Schedule I of the Code was amended or substituted by a High Court before the Amendment Act, the amended or substituted rule does not stand automatically repealed by virtue of section 97(1) for the reason that original rule or sub-rule as framed by the Legislature has not been amended by the Amendment Act. Sub-rule (4) of rule 4 of the Code provides that the Court may exempt the plaintiff from the necessity of substituting the legal representatives of any defendant, who failed to file a written statement or who having filed it failed to appear and contest the suit at the hearing. Sub-rule (5) authorises a plaintiff to apply after the expiry of the period of limitation for setting aside the abatement on cerain grounds and for admission of that application under section 5 of the Act on the ground that he had, by reason of such ignorance, sufficient cause for not making an application within period specified in the Act. The two provisions incorporated in the above sub-rules are limited in applicability whereas the powers of the Court under the provisions of substituted sub-rule (3) to rule 4 are wider. The powers conferred by sub-rules (4) and (5) also do not come in conflict with substituted sub-rule (3). Therefore, substituted sub-rule (3) is not inconsistent with the provisions of the Code as amended by the Amendment Act and does not stand repealed.

(Paras 6, 7, 9 and 10).

Case referred by Hon'ble Mr. Justice Ajit Singh Bains, on 14th March, 1978 to a larger Bench for deciding important question of law involved in the case. The Larger Bench consisting of Hon'ble the Chief Justice Mr. S. S. Sandhawalia, Hon'ble Mr. Justice S. C. Mital and Hon'ble Mr. Justice R. N. Mittal returned the case on 21st August, 1978 to a Single Judge for deciding regular second appeal.

Application under order 22, Rule 4(3) read with section 151 C.P.C. praying that the appeal may kindly be dismissed as having been abated.

Case No. 211, decided by Shri R. C. Paul, Sub-Judge, 1st Class, Ludhiana, on 25th June, 1971.

V. P. Sarda Advocate with T. S. Gujral Advocate and P. S. Sobti, Advocate, *for the appellant.*

C. B. Goel, Advocate.

D. C. Ahluwalia, Advocate and M. L. Sarin, Advocate as interveners, *for the respondents.*

JUDGMENT

Rajendra Nath Mittal, J.

(1) The short question for determination in the present reference is whether sub-rule (3) of rule 4 of Order 22 of the Code of Civil Procedure (hereinafter referred to as the Code) substituted by this Court on March 25, 1975 is inconsistent with the provisions of the Code as amended by the Code of Civil Procedure (Amendment) Act, 1976 (hereinafter referred to as the Amendment Act) and consequently stands repealed.

(2) Briefly the facts of the case are that the plaintiff instituted a suit for possession which was decreed by the trial Court. The defendant-respondents went up in appeal before the first appellate Court. The appeal was accepted by it and the suit was dismissed. The plaintiff against the judgment and decree of the first appellate Court came to this Court in second appeal. During the pendency of the appeal, defendant-respondents Nos. 1 and 3 died on February 13, 1977, but their legal representatives were not brought on the record till March, 1978. On March 7, 1978, an application (C. M. No. 458-C of 1978) under Order 22, rule 4(3) of the Code was filed by respondent No. 2 praying that on account of death of respondents Nos. 1 and 3, the appeal abated and it might be dismissed as such. It came up before Bains, J. who,—*vide* order dated March 14, 1978, referred the matter for decision to a Full Bench.

(3) To appreciate the question, reference may be made to the relevant provisions of the Code and the amendments made by this Court. Order 22, rule 4 relates to the procedure in case of death of one of the several defendants or of the sole defendant. The said rule prior to the enforcement of the Amendment Act was as follows:—

> "4. (1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant".

Section 122 empowers the High Court to make rules. This section reads as under:

"122. *Power of certain High Courts to make rules*: High Courts not being the Court of a Judicial Commissioner may, from time to time after previous publication, make rules regulating their own procedure and the procedure of the Civil Courts subject to their superintendence, and may by such rules annul, alter or add to all or any of the rules in the first Schedule."

In pursuance of the powers conferred under section 122, this Court substituted the following sub-rule in place of sub-rule (3) to rule 4 of Order 22:

"Where within the time limited by law no application is made under sub-rule (i) the suit shall not abate as against the deceased-defendant and judgment be pronounced notwithstanding the death and shall have the same force and effect as if it had been pronounced before the death took place".

In 1976, the Code was amended by the Amendment Act. The Amendment Act was, however, enforced with effect from February 1, 1977. Sub-rules (1), (2) and (3) of Rule 4 of Order 22 of the Code were retained and sub-rules (4) and (5) were added after sub-rule (3) to the said rule. The said sub-rules are reproduced below:

"(4) The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place.

(5) Where—

(a) the plaintiff was ignorant of the death of a defendant, and could not, for that reason, made an application for the substitution of the legal representatives of the defendant under this rule within the period specified in the Limitation Act, 1963 (36 of 1963), and the suit has, in consequence, abated, and

(b) the plaintiff applies after the expiry of the period specified therefor in the Limitation Act, 1963 (36 of 1963), for setting aside the abatement and also for the admission of that application under section 5 of the Act on the ground that he had, by reason of such ignorance, sufficient cause for not making the application within the period specified in the said Act,

the Court shall, in considering the application under the said Section 5, have due regard to the fact of such ignorance, if proved."

Section 97 of the Amendment Act relates to repeal and savings. The relevant provisions of the section are reproduced below:

"(1) Any amendment made, or any provision inserted in the principal Act by a State Legislature or a High Court before the commencement of this Act shall, except in so far as such amendment or provision is consistent with the provisions of the Principal Act as amended by this Act, stands repealed".

(4) It is contended by Mr Goel that in view of section 97 of the Amendment Act, sub-rule (3) of rule 4 of Order 22 of the Code as substituted by this Court stands repealed after coming into force of the Amendment Act as it is inconsistent with the original sub-rule (3) which had been retained by the Legislature. According to him, even if this interpretation is not accepted, language of sub-rules (4) and (5) is clearly inconsistent with the substituted sub-rule (3) and, therefore, the said sub-rule stands repealed.

(5) I am not convinced with this argument of the learned counsel. Section 122 of the Code authorises the High Court to alter or add to all or any of the rules in the First Schedule. By virtue of powers under section 122, sub-rule (3) of rule 4 of Order 22 of the Code was substituted by the High Court. Prior to the substitution of the sub-rule, a duty was cast upon the plaintiff to make an application for impleading the legal representatives of the deceased-defendant within

a prescribed period and if he failed to do so, the suit stood abated. It was experienced that many of the cases in the trial as well as appellate Courts stood abated under this rule as the *dominus litis* did not make application to make legal representatives of the deceased as parties to the pending list for the reason that either he did not know about the rule, or about the death of the defendant. In order to lessen the rigour of law, the High Court added rules 2-A and 2-B after rule 2 of Order 22 and sub-rules 4 to 6 to rule 4 of the said Order. It also substituted sub-rule (3) to rule 4, as already stated above. Under rule 2-A, it was made the duty of every Advocate appearing in a case, who became aware of the death of a party to the litigation, to give intimation about the death of that party to the Court and to the person who was *dominus litis*. In rule 2-B, it was provided that the duty to bring on record legal representatives of the deceased defendant would be of the heirs of the deceased and not of the person who was *dominus litis*. Substituted sub-rule (3) provided that if no application was made under sub-rule (1) within the prescribed period, the suit would not abate as against the deceased-defendant and the judgment pronounced, notwithstanding the death, shall have the same force and effect as if it had been pronounced before the death took place. Under sub-rules (4) and (5) legal representatives of the deceased defendant were authorised to make application for setting aside the decree *qua* them and if such an application was made the Court could in certain circumstances set aside the decree. By virtue of sub-rule (6) the provisions of section 5 of the Indian Limitation Act, 1963, were made applicable to the application under sub-rule (4).

(6) The main purpose for addition of rules 2-A and 2-B and sub-rules (4), (5) and (6) to rule 4 and substitution of sub-rule (3) to rule 4, was not that the legal representatives of the deceased defendant should not be brought on the record. On the other hand, its purpose was that if through over-sight or on account of some other cause, the legal representatives of the deceased defendant could not be brought on record before the decision of the suit, the decision given should remain binding on the parties. In spite of the substituted provisions, the legal representatives of the deceased defendant even after amendment by the High Court were normally impleaded as defendants in the trial as well as appellate Courts. The intention of the High Court in making these provisions was not to penalize the legal representatives of the deceased defendant. It is on account of this reason that they have been given the right to make an application for setting aside the judgment and decree of the Court under sub-rules (4) and

(5) of rule 4 and the Court has been empowered to set aside the decree if it was proved that they were not aware of the suit or that they had not intentionally failed to make an application to bring themselves on the record. The court, however, before setting aside the *ex parte* decree has to satisfy further that if the legal representatives had been on the record, a different result might have been reached in the suit.

(7) No doubt, section 97(1) of the Amendment Act provides that any amendment made or any provision inserted in the Code by a High Court before commencement of the Act shall, if it is inconsistent with the amended Code, stand repealed. But if a rule or sub-rule in Schedule I of the Code was amended or substituted by a High Court before the Amendment Act, the amended or substituted rule does not stand automatically repealed by virtue of section 97(1) for the reason that original rule or sub-rule as framed by the Legislature has not been amended by the Amendment Act. If it had been the intention of the Legislature, it would have stated so specifically. I am, therefore, unable to hold that sub-rule (3) to rule 4 as framed by this Court stands repealed after the Amendment Act.

(8) A similar matter came up before me while sitting singly in *Gian Singh* v. *Joginder Singh etc.* (1). In that case, a contention was raised by the learned counsel for the appellant that before ordering amendment of the plaint and decree sheet it was necessary that all the respondents should be served. It was argued by him that Order 41, Rule 14, of the Code added by the High Court, wherein it was provided that it would be in the discretion of the appellate Court to make any order at any stage of the appeal dispensing with service of such notice on any respondent who did not appear, either at the hearing in the Court whose decree was complained of, or at any proceedings subsequent to the decree of that Court stood repealed after the Amendment Act and the Court could not dispense with the service of the respondents under the said rule. After examining the contention of the counsel, it was held by me that all the amendments made by the High Court did not stand repealed by virtue of section 97 but only those amendments stood repealed which were inconsistent with the amended provisions of the Code. It was further held by me that Order 41 Rule 14 was not repealed by Section 97 of the Amendment Act. The above observations are applicable to the present case. In *Bhagwan Singh* v. *Kalu,* (2), Tandon, J. examined this very question i.e. whether

(1) 1978 Current Law Journal 244.

(2) 1978 Current Law Journal 247.

the substituted sub-rule (3) stood repealed after the Amendment Act. The learned Judge held that the amendment made by the High Court can be given effect to even after the amendment of the Code. The learned Judge further observed that the amendment was not inconsistent with the provisions contained in the body of the Code after amendment. I am in respectful agreement with the above observations.

(9) The second limb of the contention of Mr Goyal is that in view of addition of sub-rules (4) and (5) to rule 4 by the Amendment Act, the substituted sub-rule (3) stands repealed as these sub-rules are inconsistent with substituted sub-rule (3). I am also not impressed with this contention. Sub-rule (4) provides that the Court may exempt the plaintiff from the necessity of substituting the legal representatives of any defendant who failed to file a written statement or who having filed it failed to appear and contest the suit at the hearing. Sub-rule (5) authorises a plaintiff to apply after the expiry of the period of limitation for setting aside the abatement on certain grounds and for admission of that application under Section 5 of the Act on the ground that he had, by reason of such ignorance, sufficient cause for not making an application within period specified in the Act. The two provisions incorporated in the above sub-rules are limited in applicability whereas the powers of the Court under the provisions of substituted sub-rule (3) to rule (4) are wider. In my opinion, the powers conferred by sub-rules (4) and (5) also do not come in conflict with substituted sub-rule (3). In the situation Section 97 of the Amendment Act will have no applicability.

(10) For the aforesaid reasons, sub-rule (3) to rule 4 of Order 22 of the Code substituted by this Court on March 25, 1975, is not inconsistent with the provisions of the Code as amended by the Amendment Act and consequently does not stand repealed. Therefore, the application has no merit and is liable to be dismissed. I order accordingly. The matter may now be listed before the learned Single Judge for deciding regular second appeal.

S. S. Sandhawalia, C.J.—I agree.

S. C. Mital, J.—I agree.

H. S. B.

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