
(1924) 08 BOM CK 0007

In the Bombay High Court

Case No : Second Appeal No"s. 554, 634, 642 and 653 of 1922

Amarsangji Indrasangji

APPELLANT

Vs

Desai Umed

RESPONDENT

Date of Decision : 29-08-1924

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 33

Citation : AIR 1925 Bom 290 : (1925) 27 BOMLR 91

Hon'ble Judges : Marten, J;Fawcett, J

Bench : Division Bench

Judgement

Marten, J.—As regards Second Appeals Nos. 554, 634, 642 and 653 of 1922 a rather curious technical position has arisen. In all these cases there was a sole defendant, and the judgment of the trial Court was against that sole defendant. In each of the four cases the sole defendant appealed, but before the appeals came on for hearing he in each case died. But in each case his legal advisers appear to have been unaware of the fact, and accordingly the appeal was allowed to be heard and decided in favour of the defendant inasmuch as the lower appellate Court was in ignorance of the fact that the defendant had in fact in the meanwhile died. So, too, the plaintiffs in each suit were apparently unaware of the fact, and they presented second appeals to this Court in these suits as well as in the remaining twenty-nine companion suits. We have since heard and dismissed the plaintiffs' appeals in these twenty-nine companion suits.

2. We are now asked by the plaintiffs to say that the judgment of the lower appellate Court in the above four suits cannot stand, inasmuch as in fact the suit or the appeal had abated before the appeal was heard. Mr. Coyajee as amicus curiae has been good enough to refer us to certain sections of the Code, and has also pointed out that the course - taken in the trial Court was this, as stated by the trial Judge :-

The plaintiffs in this suit and suits Nos, 289 to 295 and 297 to 321 are the same, and the defendants in all the suits who are descendants of the original cultivators

have common contentions and so the parties have put in purshia that evidence should be led in this suit and it is to guide all the other suits. The Court has, therefore, put in copies of the findings and reasons of Suit No. 288 "in all the other suits.

3. It was accordingly suggested to us that that order in effect amounted to a consolidation order, and therefore under Order XLI, Rule 4, it was open to any of the defendants to appeal, and that on such appeal the appellate Court might reverse or vary the decree in favour of all the plaintiffs or defendants as the case might be. Alternatively under Order XLI, Rule 33, there is also a power for the appellate Court to discharge an order of the Court below in its entirety, notwithstanding that only some of the defendants may have appealed. But in my judgment both rules 4 and 33 of this Order only apply to ""a suit ", and therefore it is essential for its application that the thirty-three suits in the present case should be regarded as consolidated. In the view I take, it is perfectly clear here that no consolidation order was made, So far from there being any real consolidation, there appear to have been separate decrees passed in each of these thirty-three suits Accordingly those Orders do not, I think, help us here.

4. Nor I think is Section 107 of the Code of any assistance except that it enables us to remand a case in certain instances. No doubt under sub-section (2) we have the same powers and can perform as nearly as may be the same duties as are conferred by the Code on Courts of original jurisdiction in respect of suits instituted therein. But these powers and duties are all subject to such conditions and limitations as may be " prescribed," viz. in the Rules in the Schedule subject to authorised variations. In the present case I think it is clear that we have no power 80 set aside the abatement and to add the legal representative of the deceased defendant. The proper Court to deal with any application to excuse the delay and to set aside the abatement under Order XXII, Rules 9 (2) and 11 and to add the legal representative under Order XXII, Rules 4 and 11 is, I think, the lower Court. Id the events which have happened, the lower appellate Court had really no jurisdiction to hear the appeal as there was no appellant before it.

5. Accordingly the order which I would suggest is that the decree of the lower appellate Court in each of these four appeals be set aside, and that in each case the appeal to the lower appellate Court from the trial Court be remanded to be dealt with by the lower appellate Court according to law. We will similarly direct that the four Civil Applications Nos. 639 to 642 of 1924 which are made to us by the respective heirs of these four deceased defendants to continue the proceedings be presented to the lower appellate Court to be dealt with by that Court. In considering those applications my personal view is that the lower appellate Court may fairly take into consideration the exceptional circumstances of this case, viz., that there were thirty-three suits in which the points at issue were all substantially the same. Accordingly it is a class of litigation in which a slip as to whether one of the thirty-three parties was alive or dead might easily be made. Nor do I altogether understand why the cheaper, and as it seems to me

the more convenient, procedure was not adopted, viz., after the original decree had been passed, to take one or say two appeals as test appeals, and to stay the remaining appeals pending the ultimate decision of the test appeals. The course actually taken has involved the maximum of expense and the minimum of use to the unfortunate litigants in the present suits.

6. As regards the costs of the plaintiffs, we think that their costs up to date in the lower appellate Court and in this Court should be costs in the respective appeals to the lower appellate Court, and should be dealt with by the lower appellate Court accordingly. In the result these costs will eventually depend on what decision the lower appellate Court may arrive at as to admitting the applications of the heirs of the several defendants to continue the proceedings.

7. There was one other appeal, viz., Appeal No. 553 of 1922, in which the same contention was raised by the plaintiffs. But there were two defendants and not one, and accordingly it is conceded that the point as to abatement does not arise. Therefore as regards Appeal No. 553 of 1922 it will be dismissed with costs just as in the case of the other twenty-eight appeals.

Fawcett, J.

8. I agree