
(1977) 10 AHC CK 0028
In the Allahabad High Court
Case No : F.A.F.O. No. 407 of 1972

Amir Singh

APPELLANT

Vs

Om Prakash and Others

RESPONDENT

Date of Decision : 07-10-1977

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 10, 115, 151

Citation : AIR 1978 All 15

Hon'ble Judges : M.P. Mehrotra, J

Bench : Single Bench

Advocate : Lakshmi Bhari, for the Appellant; Prakash Gupta, for the Respondent

Final Decision : Dismissed

Judgement

M.P. Mehrotra, J.—This first appeal from order is directed against the order passed by the lower appellate court rejecting an application whereby the present appellant sought leave of the said court to be brought on record as appellant no. 2 in the appeal which was pending in the said court. The brief facts involved in the appeal are these :

One Bindeshwari Singh filed Suit No. 33 of 1968 in the Court of the Civil Judge, He was the sole plaintiff in the suit and it seems that he impugned certain gift deeds. The suit was dismissed and an appeal was filed in the lower appellate court. Bindeshwari Singh was the appellant and the defendants were impleaded as respondents. During the pendency of the said appeal, Bindeshwari Singh died and his son Musafir Singh moved an application for being substituted in the place of the deceased appellant. That application was allowed and Musafir Singh was brought on record in the place of the deceased appellant.

2. The present appellant before me, Amir Singh, applied in the lower appellate court for being impleaded as appellant No. 2. In support of his application which purposed to be under Order 22 Rule 10 read with Section 151 C.P.C., he filed an affidavit. He relied on an agreement dated 23rd Aug. 1969 which was alleged to

have been entered into between him and the deceased Bindeshwari Singh -- the latter happened to be the uncle of Amir Singh, The other side filed objections. After hearing the parties, the lower appellate court rejected the application. One of the considerations which weighed with the said court was the fact that even though the agreement dated 23rd August, 1969 had been allegedly executed during the pendency of the suit, no application had been made by Amir Singh for being impleaded as a co-plaintiff in the said suit and the application was made in the lower appellate court some time in 1972 after Bindeshwari Singh had died.

The Court was also of the opinion that the presence of Amir Singh was not necessary before the court in order to enable it to effectually and completely adjudicate upon and settle the questions involved in the suit, The court also observed that the son of the deceased respondent brought on record was prosecuting the appeal before the said court and lastly an observation was made that Amir Singh, if he had any interest in the subject-matter of the suit, could bring another suit. On the said grounds the application was rejected. Hence, he has come up in appeal to this court and in support thereof, I have heard Sri Laxmi Behari and in opposition Sri Prakash Gupta has made his submissions,

3. I have perused the agreement dated 23rd August, 1969 and it appears to me that it was an agreement intended to finance the litigation with stipulation that on success the property would be divided half and half between the parties concerned, namely, Bindeshwari Singh and Amir Singh. I am not saying anything on the question whether the agreement should be treated as a genuine one or not but as the agreement stands, even if it were to be treated as genuine, still, there is no assignment, creation or devolution, of any interest in present. It seems to me that the Division Bench authority reported in *S.V.S. Nelliappa Pillai Vs. Sethuramalingam Pillai and Others*, is clearly applicable to the facts of the instant case. There also the agreement was of an identical nature and it was held that the party concerned who sought to be impleaded under Order 22 Rule 10 C.P.C. could not be impleaded under the said provision. Reliance was placed on a Privy Council decision reported in (1913) ILR 35 All 273 (PC) (*Basant Singh v. Ma-habir Prasad*). It seems to me therefore, clear that Order 22 Rule 10 C.P.C. was not attracted to the facts of the instant case. Reference has also been made at the bar to another aspect of the matter, namely, whether if the assignment, creation or devolution of any interest took place during the pendency of the suit, then whether an assignee, or the person in whose favour such interest has been created or has devolved, has a right to move the appellate court for being brought on record under Order 22 Rule 10 C.P.C. Sri Laxmi Behari has pointed out that whereas *Phul Chand and Others Vs. Khwaja Tahir Husain*, a Division Bench authority of this court is against him on the said point, many High Courts have taken a contrary view and he has drawn my attention to *T. K. C. Iyer v. A. Amma* (AIR 1949 Mad. 870), *AIR 1947 75 (Nagpur)*, *Alagar Raja and Another Vs. Narayana Raja and Another*, and *Rajani Kanta Roy and Others Vs. Jyoti Prasad Singh Deo and Others*, , *Shri Lakshmi Behari* contended that in such a situation, if necessary, the case might go before a larger Bench as the Division

Bench of this Court is binding on me. However, in view of the fact that I have already held on another ground that Order 22 Rule 10 C.P.C. is not attracted to the present case, it is not necessary that the matter should be referred to a larger Bench. Once it is decided that Order 22 Rule 10 C.P.C. does not apply, then obviously, this appeal is not maintainable.

It is only an order passed under Order 22 Rule 10 C.P.C. which is appealable under Order 43 Rule 1 Clause (1). Thereafter Sri Lakshmi Behari contended that the application of Amir Singh in the lower appellate Court should have been treated as one u/s 151 C.P.C. or Order 1 Rule 10 C.P.C and the trial court should have allowed it. It has to be seen that if the application is to be dealt with under the said provision, then irrespective of the merits of the matter, the order could not have been an appealable one. In this situation, the learned counsel for the appellant has prayed that he may be allowed to convert the appeal into a revision. I am not granting the said prayer. In my view, I do not think any jurisdictional error is involved in the impugned order. It is well known that an order passed u/s 151 C.P.C. is an order in the nature of discretion. In such circumstances, when the court has exercised its discretion in a particular manner, even if the exercise is wrong, still, no revision lies. I do not think that the impugned order can be said to have been suffering from any jurisdictional error.

4. Learned Counsel contended that the result of the impugned order has been that his client's half interest in the property would be put in jeopardy. It is not possible to say at present whether the alleged half share it is not possible without a further probe in the matter to proceed on the said assumption. (Sic) The trial court made it clear that Amir Singh could file a regular suit if he so desired. It is well known that Order 22 Rule 10 C. P. C. is a mere enabling provision and it is not obligatory that an assignee, or a person in whose favour an interest is created or devolved during the pendency of the suit, must necessarily be impleaded under Order 22 Rule 10 C. P. C. In view of the position, there is nothing to prevent the appellant to seek his remedies, if he has any in law (for which I offer no opinion whatsoever), by a regular suit if he is advised to do so.

5. During the course of hearing, Sri B. B. P. Singh, advocate, drew my attention to a letter which he had addressed to the Deputy Registrar dated 23rd Feb. 1973 which is on record. He further drew my attention to the order sheet which shows that he took up the matter of fee payable to him as counsel on behalf of the respondent No. 6 before the court and he was directed to file an estimate of expenses. Thereafter he filed an estimate of expenses which also is on record. He desires that suitable orders be passed on the said matter. Respondent No. 6, it seems, had been impleaded in the suit as a minor defendant No. 6 aged about 16 years. The suit was filed in 1968. Therefore, in the ordinary course he attained majority some time in 1970. This F. A. F. O. was filed in 1972. Therefore, it was his duty to have informed the trial court that he had attained majority. It is true that in terms Order 32 Rule 12 C. P. C. does not apply to the

minor defendants. Still, the minor defendants on attaining majority, if they choose not to inform the court, cannot expect the cost of litigation on their behalf to be incurred by an Officer of the court appointed as a guardian, should be saddled on the shoulders of other parties.

There seems to be no justification for burdening the other party with the costs incurred on behalf of a person who has already attained majority. In these circumstances, it seems to me that primarily it was defendant-respondent No. 6 who must be held responsible for the costs which were incurred on his behalf by the guardian appointed for his benefit by the trial court. In these circumstances, I think the defendant-respondent No. 6 should be directed to pay the amounts mentioned in the estimate which has been filed in this court on his behalf by his guardian ad litem. The said estimate shows that a sum of Rs. 220/- has been claimed as the counsel's fee, Rs. 110/- as guardian fee and Rs. 30/- as miscellaneous expenses. The estimate seems to be reasonable. The defendant-respondent No. 6 shall pay the sum of Rs. 220/- to Sri B. B. P. Singh, Advocate who put in appearance in this appeal as a counsel on his behalf and the rest of the amounts, namely, Rs. 110/- and Rs. 30/- to Sri K. K. Srivastava. the guardian concerned.

6. In the result, the appeal fails and is dismissed. Subject to the aforementioned liability of defendant-respondent No. 6 to pay the expenses to his counsel and his guardian, as stated above, there will be no order as to costs in this appeal.