

(2020) 01 GAU CK 0019

In the Gauhati High Court

Case No : Regular Second Appeal No. 41 Of 2006

Babu Ram Goala And Ors

APPELLANT

Vs

Samir Kanti Bhowal And Ors

RESPONDENT

Date of Decision : 24-01-2020

Acts Referred:

Code Of Civil Procedure, 1908 — Section 2(2), 11, 96, 100, 104, 144, Order 9 Rule 13, Order 22 Rule 9, Order 22 Rule 9(1), Order 22 Rule 9(2), Order 22 Rule 11, Order 43 Rule 1, Order 43 Rule 1(k)
Limitation Act, 1963 — Section 5

Citation : (2020) 01 GAU CK 0019

Hon'ble Judges : Mir Alfaz Ali, J

Bench : Single Bench

Advocate : S Senapati, S Senapati

Final Decision : Disposed Off

Judgement

1. This second appeal was admitted to be heard on the following substantial question of law.

A. Whether the learned appellate court was right in dismissing the entire appeal as having been abated for not impleading the legal heirs of appellant No. 8 therein, Mewalal Goala on the ground that it appeared to the learned appellate court that the decree passed in favour of the plaintiffs was joint and indivisible?

B. Whether the appellate court below erred in treating the decree of the trial court against the appellant as joint and indivisible when the trial court itself dismissed the suit for 8-K, 14-Ch. out of 18-K, 14Ch. against some other defendants?

2. The facts leading to the present second appeal may be stated thus:

3. The respondents herein and/or their predecessor-in-interest filed Title Suit No. 338/1981 for declaration of right, title, interest and recovery of possession against the appellant herein. Learned Munsiff decreed the suit in favour of the

plaintiffs. The defendants (appellants herein) preferred the first appeal before the learned Civil Judge, which was registered as T.A. No. 1/1987. During the pendency of the appeal, one of the appellant (appellant No. 8), namely, Mewalal Goala died. Later on, an application was filed by the legal representative of Mewalal Gowala, the appellant No. 8, for impleadment/substitution and also for setting aside abatement. However, learned Civil Judge, by the impugned order dated 07.12.2005 rejected the petition for setting aside abatement and substitution of the legal heirs of the appellant No. 8, Mewalal Gowala and consequently dismissed the entire appeal as having been abated. Aggrieved by the said order dated 07.12.2005, passed by the learned Civil Judge, Silchar in T.A. No. 1/1987, the appellant has preferred the instant second appeal.

4. Learned Sr. Counsel, Mr. G.N. Sahewalla, for the appellant and learned counsel Mr. A. Sattar for the respondents were heard.

5. Learned Sr. Counsel Mr. Sahewalla submitted that the appeal could not have been dismissed in toto, inasmuch as, for non-substitution of the legal heirs of the appellant No. 8, at best, the appeal qua the deceased appellant No. 8 could be abated. However, learned Civil Judge wrongly passed the order rejecting the application for setting aside abatement and substitution of legal heir of appellant No. 8 and dismissed the entire appeal as having been abated.

6. Per contra, learned counsel for the respondent Mr. A. Sattar supporting the impugned order submitted that the decree passed by the learned trial court was a joint and indivisible decree and therefore, the entire appeal stood abated for death of the appellant No. 8 and for not substituting the legal heirs of the appellant No. 8 within time. Mr. Sattar also raised objection regarding maintainability of the appeal and placing reliance on a decision of the Apex Court in *Madan Nayak (dead) by LRS Vs. Hansubala Devi & Ors.* reported in (1983) 3 SCC 15 contended that the impugned order is appealable under Order 43 Rule 1(K) CPC and therefore second appeal is not maintainable.

7. Refuting the above submission, Mr. Sahewalla, learned counsel for the appellant contended that though, dismissal as a consequence of abatement may not amount to adjudication of a decree on merit of the appeal, it brings finality to the decision rendered by the trial court by way of dismissal of the appeal and therefore, the appellant had no option, but to file a second appeal under Section 100 of the CPC. Mr. Sahewalla further contended in the alternative, that in the event of the second appeal is not found to be maintainable, the second appeal be converted to an appeal against order. To buttress his submission on the maintainability of the second appeal, Mr. Sahewalla placed reliance on the following authorities.

(i) (2005) 1 SCC 436 (*Shyam Sundar Sarma Vs. Pannalal Jaiswal & Ors.*)

(ii) (2007) 11 SCC 285 (*Bhag Mall @ Ram Bux & Ors. Vs. Munshi (dead) by LRS & Ors.*)

(iii) AIR 1956 SC 367 (Melaram & Sons Vs. Commissioner of Income Tax, Punjab)

8. Having regard to the rival contentions raised by the learned counsel for both the sides pertaining to maintainability of the second appeal, I feel it apposite to address the question of the maintainability of the second appeal at the outset. Before proceeding further, it would be beneficial to reproduce the following provisions of the CPC for better appreciation of the matter.

"Order 43 Rule 1: An appeal shall lie from the following orders under the provision of Section 104, namely,

(a)

(b)

(k) an order under rule 9 of Order XXII refusing to set aside the abatement or dismissal of a suit"

Section 2 (2) defines the decree as under:

"Decree means the formal expression of a adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any f the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 144, but shall not include -

(a) any adjudication from which an appeal lies as an appeal from an order, or,

(b) any order of dismissal for default."

Section 100 of CPC reads as under:

"(1) Save as otherwise expressly provided in the body of this code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.

(2) An appeal may lie under this section from an appellate decree passed ex-parte.

(3) In an appeal under this section, the memorandum of appeal precisely state the substantial question of law involved in the appeal.

(4) Whether the High Court is satisfied that a substantial question of law involved in any case, it shall formulate that question.

(5) The appeal shall be heard on the question so formulated and respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question.

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the court to hear, for reasons to be recorded, the appeal on

any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question."

"Order 22 Rule 11 CPC provides that in the application of this order to appeals, so far as may be the word 'plaintiff' shall be held to include as appellant, the word 'defendant' as respondent and the word 'suit' as appeal."

9. Thus, the provision of Section 100 of the CPC provides that a second appeal on substantial question of law shall lie from a decree passed on appeal by the appellate court. Therefore, in order to maintain a second appeal, there has to be a decree passed by the first appellate court and there must be a substantial question of law involved in the appeal. Necessarily, unless there is a decree of the appellate court, there cannot be second appeal. As per the definition of decree provided in Section 2(2) of the CPC, 'decree' means formal expression of an adjudication conclusively determines the right of the party or any matters in controversy in the suit. Therefore, in order to be a 'decree', the court must adjudicate the matter and upon such adjudication there must be a decision on the basis of the adjudication conclusively determining the rights of the parties. If the court does not adjudicate the lis and decide the rights of the parties conclusively, there cannot be a decree as defined by Section 2(2) CPC. Clause (a) of Section 2(2) provides that any adjudication from which an appeal lies as an appeal from an order is not a decree. Order 43 Clause (k) provides that an order under Rule 9 of Order XXII refusing to set aside the abatement and consequent dismissal of a suit is amenable to appeal under Section 104 CPC.

10. In the instant case, apparently the appeal was not decided on merit, inasmuch as, the appellate court did not adjudicate the lis determining the rights of the parties conclusively, rather, the appeal was dismissed as having been abated upon rejection of an application under Order 22 Rule 9 CPC. One of the appellant (appellant No. 8) in T.A. No. 1/1987 died and his legal heirs were not substituted in time. When an application was filed purportedly under Section 22 Rule 9 CPC at a later stage, for setting aside abatement and substitution, learned Civil Judge by the impugned order rejected the petition for setting aside abatement and consequently dismissed the entire appeal, as having been abated. Thus, apparently, by the impugned order in the instant case, the learned Civil Judge did not adjudicate the matter nor conclusively determined the rights of the parties on merit upon adjudication and the dismissal was as a consequence of abatement, which was nothing but closure of the matter. It is trite law, that Order 22 Rule 9 of the CPC does not envisage a formal order of dismissal of a suit or appeal on abatement, inasmuch as, abatement takes place automatically by lapse of time, if the legal heirs are not brought on record within time prescribed by law. This apart, the adjudication made by the learned first appellate court by the impugned order is amenable to appeal as an appeal from an order under Section 104 CPC and as such, the impugned order is not a decree in view of Clause (a) of Section 2(2) CPC. Therefore, a conjoint reading of the definition of decree, more particularly, the clause(a) of Section 2(2) and the

provision of Order 43 Rule 1(k) as well as Order 22 Rule 11 CPC makes it abundantly clear that the impugned order dated 07.12.2005, under Order 22 Rule 9 CPC, whereby the learned Civil Judge refused to set aside the abatement and the prayer for substitution of the legal heirs of the deceased appellant and consequent dismissal of the appeal as having been abated was not a decree. To put it differently, in the present case, there was no decree passed by the appellate court to be appealed against in a second appeal.

11. When there was no decree passed by the appellate court and the order impugned is amenable to appeal, as an appeal from an order, obviously no second appeal shall be maintainable. The Apex Court, in *Madan Nayak* (supra), relied by the learned counsel for the respondent, in a similar situation where, the first appeal was dismissed as having been abated, upon rejection of the application for setting aside abatement under Order 22 Rule 9 CPC, held as under:

"8. Section 2 Sub-section (2) of the CPC defines 'decree' to mean "the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to allow any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 144 but shall not include any adjudication from which an appeal lies as an appeal from an order." When an appeal abates for want of substitution as envisaged by Sub-rule 1 of Rule 9 of Order 22, it precludes a fresh suit being brought on the same cause of action. It is a specific provision. If abatement implied adjudication on merits, Section 11 of C.P.C. would be attracted. Abatement of an appeal does not imply adjudication on merits and hence a specific provision had to be made in Order 22 Rule 9(1) that no fresh suit could be brought on the same cause of action. Therefore when the appeal abated there was no decree, disposing of the first appeal, only course open is to move the court for setting aside abatement. An order under Order 22 Rule 9(2) C.P.C. refusing to set aside abatement is specifically appealable under Order 43 Rule 1(k). Such an adjudication if it can be so styled would not be a decree as defined in Section 2(2) C.P.C. Section 100 provides for second appeal to the High Court from every decree passed in appeal by any Court subordinate to the High Court on the grounds therein set out. What is worthy of notice is that a second appeal lies against a decree passed in appeal. An order under Order 22 Rule 9 appealable as an order would not be a decree and therefore, no second appeal would lie against that order. Such an appeal is liable to be rejected as incompetent."

12. In *Bhag Mall and Ors. Vs. Munshi* (supra), one Sher Singh alienated the suit property to one Bansi by registered sale deed. The legality and validity of the said sale came to be questioned, in a suit filed by the legal heirs of Sher Singh. The suit was dismissed by the trial court. However, the appellate court decreed the suit by the judgment and order dated 11.04.1969, against which a second

appeal was filed. During pendency of the second appeal Banshi died. As the legal heirs of Banshi was not brought on record, the second appeal was dismissed as having abated, by order dated 14.10.1977. Thereafter, the legal heirs of Sher Singh filed a suit on 03.11.1977 for possession in terms of Punjab Limitation (Custom) Act, 1920, which was decreed by the trial court. Appeal preferred there against was dismissed. A second appeal was preferred and during the pendency of the second appeal, the question which arose for consideration was, as to whether, having regard to the fact that the order dated 14.10.1977, in terms whereof the second appeal was dismissed, as having abated, not being a decree, the suit was required to be filed within a period of three years from the date of judgment and decree passed by the first appellate court or not. The High Court observed that the suit ought to have been filed within three years from the date of first appellate decree and held that the order dismissing the appeal/suit on abatement does not amount to adjudication on merit and therefore the suit filed within three years from 14.10.1977 was barred by limitation. The question that arose for consideration before the Apex Court was, as to what would be the date on which the declaratory decree can be said to have been obtained by the appellants (LRS of Sher Singh) or in other words from which date the limitation of three years would be counted i.e. 11.04.1969, the date of judgment and decree by first appellate court or 14.10.1977, on which date the second appeal was dismissed on abatement. The Apex Court observed that though, abatement may not amount to adjudication of a decree on merit, it would bring finality to the suit, because decision on merit is not the only test to determine the finality of decision. In the event of the decision gaining final shape on successful abatement the order of dismissal on abatement gives new starting point for the period of limitation and therefore, the suit filed within three years from 14.10.1977 was not barred by limitation. The Apex Court held thus:

"In fine, when an appeal/suit abates, the same may not amount to adjudication of a decree on merit but indisputably it would attain finality. Decision on merits is not the only test to determine the finality of decision. Finality gained due to abatement is an illustration of the aforementioned variety. The declaratory decree, in that view of the matter passed in favour of the respondents had attained finality only when the order dated 14.01.1977 was passed."

13. In *Shyam Sundar Sarma* (supra), the facts were that - against an order of dismissal of the suit for default, application under Order 9 Rule 13 CPC along with a petition under Section 5 of the Limitation Act was filed. The delay was condoned and the petition was taken up for hearing. The defendant also filed an appeal against the dismissal of the suit along with the application under Section 5 of Limitation Act. The appeal was however, dismissed as a consequence of dismissal of the condonation petition. Objection was raised against the maintainability of the petition under Order 9 Rule 13 CPC, in view of the explanation to Rule 13 and it was observed by the High Court and upheld by the Apex Court that petition under Order 9 Rule 13 was not maintainable in view of dismissal of the appeal against the same order. The Apex Court held that

dismissal of appeal on withdrawal cannot be equated with dismissal of appeal as barred by limitation or for default. The Apex Court held that "an appeal filed along with an application for condonation of delay in filing appeal when dismissed on refusal to condone the delay is nevertheless a decision in the appeal".

14. In *Mela Ram & Ors. Vs. Commissioner of Income Tax (supra)*, also the Apex Court held that order dismissing an appeal as time barred is one passed in the appeal and this decision was also relied in *Shyam Sundar Sarma (supra)*.

15. Thus, on factual matrix of the present case, ratio laid down in all the above authorities relied by the learned counsel for the appellant are distinguishable, because question of finality of a decision and whether a decision/order is amenable to appeal or second appeal is not the same thing. It must be borne in mind that right to appeal under Section 96 or 100 CPC being a statutory right, no appeal either under Section 96 or 100 CPC would lie save as provided by the statute. Looking from another angle, dismissal of a suit or appeal as time barred and dismissal of a suit or appeal on abatement cannot be equated, reason being that though, an order dismissing the suit or appeal as time barred, is held to be an order passed in the suit or appeal, there may not necessarily be an order of dismissal of the suit or appeal on abatement, inasmuch as, no order is required for dismissal of a suit or appeal on abatement. As already indicated above, when the statute expressly provided that the order impugned here in this second appeal is amenable to appeal, as an appeal from order, and the order impugned is also excluded from the definition of decree, no second appeal shall lie against the impugned order of dismissal of the first appeal as having abated as a consequence of rejection of the application under Order 22 Rule 9 CPC.

16. In view of the above position, I am constrained to hold that this second appeal is not maintainable, for the reasons that the impugned order is not a decree of the first appellate court and secondly, such an order is amenable to appeal as an appeal from an order. Having said so, I feel it unnecessary to discuss the substantial question of law raised in this second appeal, as the same would be a mere academic exercise.

17. However, having regard to the alternative submission of Mr. Sahewalla for conversion of this second appeal to an appeal against order, to which, Mr. Sattar, learned counsel for the respondent has not objection, I deem it appropriate to convert this second appeal to first appeal against order, keeping in mind that the matter is pending since 2006. Accordingly, the second appeal stands disposed of. The Registry shall register the memo of appeal, as an appeal (FAO) and list for hearing immediately.