

(1932) 06 AHC CK 0008
In the Allahabad High Court

Badri Nath and Another

APPELLANT

Vs

Raja Ram and Others

RESPONDENT

Date of Decision : 20-06-1932

Acts Referred:

Citation : (1932) 06 AHC CK 0008

Hon'ble Judges : Mukerji, J

Bench : Single Bench

Judgement

Mukerji, J.—This appeal is by two of the plaintiffs in the original suit. The history of the case is this. One Ram Harakh Pande obtained a preliminary decree against certain defendants, including the plaintiffs of the suit out of which this appeal has arisen. This decree was made on 24th January 1924. Ram Harakh died some time in November of that year. On 3rd February 1926, Ram Harakh's four sons make an application, to the Court which had passed the preliminary decree for making the preliminary decree final. Notices were issued to the defendants and nobody appeared to contest the application. A final decree was passed on 24th April 1926. On 26th April 1928, the plaintiffs instituted the suit to obtain a declaration that the final decree passed against them was null and void. The defence was various and the principal defence was that the suit was barred by res judicata. We may point out here that one of the grounds taken in the plaint was that the final decree had been obtained by fraud on Court and the defendants. As to this they replied that there was no fraud.

2. The Court below dismissed the suit and hence this appeal by two only out of the five plaintiffs. We have to consider two points: first whether there was any fraud in obtaining the final decree and secondly, whether the final decree was passed without jurisdiction, and therefore is null and void.

3. On the first point the only evidence on the record is the statement of Sadhu Saran, one of the plaintiff-appellants to the effect that he received no notice alleged to have been issued before the preparation of the final decree. Supposing that Sadhu Saran did not receive any notice it does not follow that there was any

fraud perpetrated by the decree-holders, and therefore the issue must be decided against the appellants. On the second point the argument is that the decree that was passed on 24th April 1926 was a nullity inasmuch as the Court had no jurisdiction to entertain the application for making the final decree without setting aside the abatement which had automatically taken place on the failure of the sons of Ram Harakh to obtain a substitution of names within 90 days of the death of their father. We are of opinion that this argument is not at all sound. The nature of an abatement is not a final disposal of the case either by dismissal or by decreeing it. The word "abatement" literally means lessening or shortening and is now very little used except in legal phraseology. When a Court is unable to proceed with a case pending before it for the reason that the proper parties are not before it, it is said that the case has abated. When an application is made to bring the necessary parties before the Court, the Court brings the proper parties before it and proceeds with the hearing. An application for setting aside an abatement may be made long after the case has actually abated. A cause may be shown by the party asking for the setting aside of the abatement as to why the application was not made earlier; Section 5, Lim. Act, applies to such an application. If on the abatement of a Suit, the Court ceases to have jurisdiction, how is it possible for it to entertain an application for the setting aside of the abatement made long after the three months period ordinarily allowed for setting aside the abatement has elapsed? We are therefore of opinion that the Court does not cease to have jurisdiction in the matter in which an abatement takes place. In this view we are not prepared to accept the dictum of Coutts, J., of the Patna High Court in *Bibi Khozaima v. Official Liquidator of Kayesha Trading and Banking Corporation Ltd.* AIR 1923 Pat. 417 where the learned Judge made the following remark:

The abatement must however be set aside before the substitution can be made and in making the substitution without setting aside the abatement, the Court certainly acted without jurisdiction.

4. We have in this Court definitely held in a Full Bench decision in *Churya and Others Vs. Baneshwar*, that an abatement takes place automatically and does not require an order of the Court to be passed to that effect. Before this decision was given, the view taken by a Division Bench of this Court was that an abatement could take place only by the passing of an order to that effect: see *Gujrati v. Sital Misir* AIR 1922 All. 209. Assuming that where a suit abates, the Court ceases to have jurisdiction to hear it, till the abatement is set aside, as held by the Patna High Court, in the view of this Division Bench the Court would not cease to have jurisdiction simply because a certain party in a cause had died, for according to that view an abatement could take place only when an order to that effect has been made.

5. The Full Bench decision in *Churya and Others Vs. Baneshwar*, was given on 11th January 1926, and could not have been published in Indian Law Reports till, say the end of the year. Even in unauthorized reports it could not have been

published till a few months later. When Ram Harakh Pande died on 4th November 1924, the earlier ruling of *Gujrati v. Sital Misir* AIR 1922 All. 209 which was given in 1923, was the view of this Court and one can easily see therefore why in the application of 3rd February 1926 for the making of the final decree, there was no prayer for setting aside the abatement; As. regards that application it was argued by Dr. Katju that it showed the male fides of the sons of Ram Harakh, inasmuch as they did not mention the date of the death of their father. But if no abatement had taken place, for there was no order of the Court in existence declaring an abatement, surely it was not necessary for the sons of Ram Harakh to mention the date of Ram Harakh's death and to apply for setting aside the abatement. We cannot therefore infer any bad faith from the application. Now the question is whether the decree of 1926 is a nullity. We have found that the Court which made the decree was possessed of jurisdiction. Thus the decree cannot be bad for want of jurisdiction on the part of the Court making it. No other ground remains for arguing that the decree is a nullity.

6. We are clearly of opinion that the decree of 1926 operates as *res judicata* against the appellants, and it is not open to them to challenge it by a separate suit. When the decree was passed in 1926 the defendants had either been served with a notice or not; in either case, the decree would be binding on the defendants. If as we have found, there was no fraud in the passing of the decree, the only way in which it could be set aside was by an application under Order 9, Rule 13, Civil P.C. No such application was made. On the other hand we find that when execution was taken out and notices were served on the plaintiffs and the present appellants, they filed objection to the execution of the decree, but none of the grounds stated that the decree had been passed without any previous information given to the objectors: see pp 35 and 36. The decree having not been taken exception to, in the only way it could be taken exception to, is binding on the plaintiffs and on the appellants and it cannot be challenged by a separate suit. In the result the appeal fails and we hereby dismiss it with costs.