

(1994) 07 MP CK 0001

In the Madhya Pradesh High Court

Case No : Miscellaneous Civil Case No. 229 of 1987

Baliram Latori Singh and Another

APPELLANT

Vs

Prem Totaram and Another

RESPONDENT

Date of Decision : 13-07-1994

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 11, Order 22 Rule 4, Order 47 Rule 1
Limitation Act, 1963 — Section 5

Citation : (1994) 39 MPLJ 993 : (1994) MPLJ 993

Hon'ble Judges : S.K. Dubey, J;A.S. Tripathi, J

Bench : Division Bench

Advocate : N.K. Jain, for the Appellant; B.D. Jain, for the Respondent

Judgement

S.K. Dubey, J.

This is an application under Order XLI, Rule 1 of the CPC for obtaining, a review of the judgment and the decree passed in Second Appeal No. 311 of 1973 on 2-9-1987 by R. M. Rustogi, J., who is no more in this world.

Facts giving rise to this review petition are these. The plaintiffs/applicants filed a suit for declaration of title to agricultural land, as described in the plaint and for correction of entries in the annual village papers. According to the plaintiffs, the suit lands were khudcasht lands of their father who was Zamindar. The defendant cultivated the suit lands on Batai from Samvat 2001 to 2004 who then voluntarily gave up the possession of the suit lands in Samvat 2004. The defendant was, thus, in possession of the suit lands at the time of enforcement of the M. B. Zamindari Abolition Act, 1951. The plaintiffs contended that the defendant's name was wrongly entered as sub-tenant in the annual village papers in Samvat 2008. On 4-9-1954, the defendant had filed an application u/s 91 of the M. B. Land Revenue and Tenancy Act, 1950 before the Tahsildar for restoration of possession of the suit land on the plea that he had been dispossessed by the plaintiffs on 9-7-1954. The said application was allowed by the Revenue Courts,

but was ultimately dismissed by the Additional Commissioner, Gwalior Division on 5-9-1963 in Revenue Appeal No. 462 of 1961. The plaintiffs claimed that they had acquired title to the suit lands by adverse possession being in continuous, peaceful and active possession from 1951 till the time of institution of the suit, i.e., on 8-4-1968. The defendant resisted the suit on the ground that he had been in possession of the suit lands as sub-tenant much prior to the time of the abolition of Zamindari and had now acquired the Bhumiswami rights. The defendant also pleaded that the plaintiffs had voluntarily surrendered the possession of the suit lands to him, after the decision of his application u/s 90 of the M. B. Land Revenue and Tenancy Act of the Tahsil Court in Case No. 112/54x91.

The trial Court decreed the suit of the plaintiffs, holding that the plaintiffs had perfected their title by adverse possession. The defendant preferred an appeal. The first appellate Court reversed the decree of the trial Court and dismissed the suit of the plaintiffs inter alia holding that the suit was barred by time; the plaintiffs had not perfected their title by adverse possession, as the period of adverse possession was only of five years, i.e., from 1963 to 1968. Against this judgment and decree of dismissal of the suit, the plaintiffs preferred a second appeal.

The second appeal was finally heard on 14-8-1987 by R. M. Rustogi, J., which was dismissed on 2-9-1987. It is this judgment and decree, against which this review petition was filed on 2-12-1987 impleading the legal representative of the deceased respondent as non-applicant. Along with the review, an application under Order XXII, Rule 4, Civil Procedure Code, and application u/s 5 of the Limitation Act praying condonation of delay in filing the application for review, have also been filed.

Shri N. K. Jain, learned counsel for the applicants, placing reliance on a short-noted decision of this Court in the case of Parmanand v. Indira Bai and Ors. 1971 J.L.J. SN 49; and a decision rendered by one of us (S. K. Dubey, J.) in the case of Hajarilal v. Sardarsingh 1988(11) MPWN 103, contended that judgment and decree so passed in ignorance of the death of the sole respondent without substituting his legal representative is a nullity, as the Court lacked in its jurisdiction to pass any order; since the appeal stood abated, the fact that the decree is in favour of the respondent has no effect.

On the other hand, Shri B. D. Jain, learned counsel for the non-applicant, placing reliance on a decision of the Supreme Court in the case of Devaraju Pillai Vs. Sellayya Pillai, submitted that if the applicants are aggrieved of the judgment of the learned Single Judge passed in the second appeal, the appropriate remedy for the applicants is to file an appeal against the judgment, remedy by way of an application for review is entirely misconceived. It was also submitted that the judgment and decree so passed in favour of the respondent, who died during the pendency of the appeal, need not be set aside. It is only in cases where the decree is passed against a dead person that such question arises, since such

decrees are voidable at the instance of the heirs of the deceased party. It is not open to the applicants, who were really heard at the appeal and against whom a decree was passed on the merits, to take advantage of the death of the respondent and claim rehearing of the appeal on merits; counsel placed reliance on a decision in the case of (Thamarapalli) Surya Narayana Vs. (Gopavajhala) Joga Rao and Others,

Appeal is a continuation of suit; by virtue of Order XXII, Rule 11, Civil Procedure Code, the provisions of Order XX apply to appeals. Therefore, the effect of this Rule is that if a decree is passed in appeal in case of the death of sole appellant without impleading his legal representatives, it will be a nullity. So also, when the sole respondent in an appeal dies and his legal representatives are not brought on record, the appeal will abate. Therefore, the question before us is not whether the judgment and decree so passed is in favour of the respondent who has died or is against him. Certainly, if the judgment had been against him, that judgment, without any doubt, would have been a nullity; but in the present case, the judgment and decree is in favour of the sole respondent who died in January, 1987, before hearing of the appeal, i.e., 14-8-1987. By the time the prescribed period of limitation for bringing legal representatives on record had expired; as a consequence, that appeal stood abated. Abatement is always automatic, it is not necessary for a Court to pass a separate order for abatement. Therefore, on the date of the hearing of the appeal, there was no proceeding before the Court, the Court was not seized of the lis between the parties. In such a situation, the Court lacked in its inherent jurisdiction to pass any order, and therefore, if a decree is passed in ignorance of the death of the sole respondent, in favour of the respondent, it would be a nullity. See, the decisions of this Court in cases of Parmanand and Hajarilal (supra) and a Division Bench decision of Gujarat High Court in case of Jiviben Lavji Raganath Vs. Jadavji Devshanker and Others,

The law is well-settled that if a Court lacks in its inherent jurisdiction, arguing of the appeal by the appellant at the time of hearing will not make any difference as the jurisdiction cannot be assumed, no question of acquiescence, estoppel or waiver applies in such a situation. If any authority is needed, see a decision of the Supreme Court in the case of Seth Hiralal Patni Vs. Sri Kali Nath,

As an upshot of the above discussion and the settled view of this Court that a decree passed in favour of a dead person without bringing his legal representatives on record is a nullity, we are not inclined to take a different view on the basis of the decision of the Madras High Court in case of Surya Narayana (supra) relied by Shri Jain.

As a result of the above, we hold that the judgment and decree passed by the learned Single Judge in Second Appeal No. 311 of 1973 in favour of the deceased sole respondent without substituting his legal representatives on record in time and without setting aside the abatement, is without jurisdiction and is a nullity. However, because of the abatement of the appeal the judgment and decree passed by the first appellate Court dismissing the suit of the plaintiffs became

final. In such circumstances, it is for the applicants, if so advised, to take appropriate proceedings in accordance with law for setting aside abatement. Accordingly, the review petition is disposed of with no order as to costs.