
(1975) 12 PAT CK 0003
In the Patna High Court
Case No : A.F.A.D. No. 196 of 1972

Bishundeo Rai and Others	Vs	APPELLANT
Chandrawati Kuer and Others		RESPONDENT

Date of Decision : 18-12-1975

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 11, Order 22 Rule 4

Citation : AIR 1976 Patna 352

Hon'ble Judges : Hari Lal Agrawal, J

Bench : Single Bench

Advocate : Devendra Prasad Sharma and Ramanugrah Prasad Singh, for the Appellant; S.C. Mukherji and L.N. Yadav, for the Respondent

Final Decision : Dismissed

Judgement

Hari Lal Agrawal, J.—A preliminary objection has been taken up in this appeal on behalf of plaintiffs-appellants who were respondents in the court of appeal below that respondent No. 3 Bahuria Indrajot Kuer having died during the pendency of the title appeal leaving behind a daughter Malti Devi as well, besides her two sons already on the record, in the absence of any step for substitution having been taken by the appellants in the court of appeal below the whole title appeal had abated and, therefore, it could not have proceeded to a judgment.

2. Mr. S. C. Mukherji, appearing for the respondents, however, contends that, there is no question of abatement in this case. He further contends that in view of the fact that two of the heirs of the deceased, respondent Bahuria being already on the record of the case her estate was fully represented under the title appeal and, therefore, there was no question of any abatement of the title appeal.

3. In order to appreciate and decide this question it is necessary to discuss the matter in a little detail. The suit was instituted by the two sons of one Ghughli Rai and his widow, namely, Bahuria Indrajot Kuer, for declaration of title and

possession with respect of 31/2 dhurs of land from the eastern side of Survey Plot No. 644 appertaining to khata No. 140 of village Barhara in the district of Saran on the assertion that Ghughli Rai purchased the said Khata in the court auction sale against the recorded tenant of the khata and after taking delivery of possession has been coming in its possession including the suit land and after his death the plaintiffs being his heirs came in actual physical possession thereof. Contiguous east of this plot is Survey Plot No. 641. It was asserted that on the 15th day of Asadh, 1368 Fs. the defendants broke the eastern ridge of plot No. 644 in the absence of the plaintiffs and amalgamated the suit land with their own land, namely, Plot No. 641.

4. The plea of the defendants was the denial of this story of the breaking of the ridge and amalgamation of the disputed land with plot No. 641. The definite case was that the disputed land appertained to their own plot No. 641 over which they had been coming on in possession peacefully from a long time in their own rights.

5. The trial court as already said above decreed the suit and held that the defendants had no title to the disputed land and dispossessed the plaintiffs as alleged by them. On appeal, the learned Subordinate Judge, however, took a contrary view and dismissed the suit.

According to him the documents of title introduced by the plaintiffs were not sufficient to establish that Ghughli Rai has purchased the khata in question in court auction sale. The plaintiffs' evidence with respect to their case of possession and dispossession was also found unsatisfactory. It is true that the defendants' case of possession was also not found satisfactory and the court below followed the well established principle that the plaintiff must succeed on the strength of his own case and in a suit for recovery of possession, he cannot rely on the weakness of the case of the defendant, he dismissed the suit. No citation is necessary in support of this proposition as it is well established, by a long line of judicial decisions.

6. Now, I shall take up the question as to whether on the death of Indrajot Kuer, mother of the first two plaintiffs who died leaving, besides the two other plaintiffs, had also a daughter, namely, Malti Devi appellant No. 3, who has joined in this appeal as an appellant along with her brothers. The contention raised on behalf of the appellant as a preliminary objection which has been noticed earlier, is based upon the decisions of this Court, in the case of Ram Saran Ahir and Others Vs. Prithvi Nath Singh and Another, and Mrs. Gladys Coutts Vs. Dharkhan Singh and Others, where it was held that the question of abatement of an appeal could be decided only by the court where the abatement had taken place and where a decree had been passed by the court of appeal below in ignorance of the death of the respondent, the proper procedure to decide the question of substitution if an application is filed for setting aside the abatement was to set aside the decree of the lower appellate court and send the application along with the appeal in accordance with law. The view of this Court which is fully established is based on the principle that in the absence of the left out heirs, the

question of abatement of the appeal arises and the appeal in the absence of those heirs could not proceed. This is the established view of this Court no doubt, but the situation of the present case is entirely different. It has been said earlier that the left out heir of Indrajot Kuer, namely, her daughter Malti Devi has already joined hands with her brothers as an appellant in this Court. In the two petitions, one filed by the appellants in this Court on 28th November 1972, seeking permission to continue her also the appeal as an appellant and the other filed under Rule 5, Clause (b) of Chapter VI of the Rules of this Court on 19-1-1973, neither the heirs on the record nor Malti Devi made any grievance that the interest of Malti Devi was not fully represented by the remaining plaintiffs on the record or that there was any conflict between the interest of Malti Devi and her brothers. In recent years the previous view has undergone a substantial change by the two decisions of the Supreme Court, in the cases of Dolai Molliko and Others Vs. Krushna Chandra Patnaik and Others, and Mahabir Prasad Vs. Jage Ram and Others, where the Supreme Court settled the matter beyond all controversy that in a proceeding where a party dies and one of the legal representatives is already on the record, it is only necessary that it should be described by an appropriate application that he is also on the record as an heir and legal representative. Even if there are other heirs and legal representatives and no application impleading them is made the proceeding will not abate on that account unless the interest of the left out heirs was not being represented by the legal representatives already on the record.

7. The third heir, namely, Malti Devi of the deceased respondent in the court below has not made out the case of any conflict of interest or non-representation of her interest by the remaining heirs and legal representatives already on the record of the case. In my opinion, therefore, it is not a case where the title appeal in the court below had become incompetent or had abated and could not proceed in the absence of any step for substitution. It seems obvious to me that in cases where a party dies during the pendency of any appeal and his estate is represented by some of his heirs already on the record, then the appeal could successfully proceed although steps for bringing the left out heirs are not taken unless these heirs might have a different and independent case than of the heirs on the record. In cases, however, where the question of abatement is apparent, the question of setting aside the same has got to be decided by the court concerned. A similar view has already been taken by me in the case of Harbans Singh and Others Vs. Rajpaltan Singh and Others, although there the circumstances were different.

8. Mr. Devendra Prasad Sharma, however, also placed reliance upon Single Judge decision of the Delhi High Court in the case of Satnam Singh and Another Vs. Mohinder Singh and Others, laying down the general proposition that if one of the respondents had died during the pendency of an appeal not known to the court and if the judgment was delivered in ignorance of this fact, the judgment should be treated as non-existent and the appeal be allowed to be reheard. This case is apparently distinguishable as in that case the respondent Amarnath, who

had died was not represented by any of his heirs or legal representatives on the record, and the decree, therefore, was certainly passed against a dead person. For all these reasons I would overrule the preliminary objection raised on behalf of the respondent regarding the incompetency of the appeal and I do not find that in this case the matter should be remitted back to the court of appeal below for deciding the question of abatement at all.

9. Coming to the merits of the appeal, Mr. Sharma appearing for the appellant contended that the court of appeal below has not correctly appreciated the plea of the defendants as according to them, they had not claimed any portion of Plot No. 644 and according to the finding of the Pleader Commissioner whose report was confirmed, the disputed land appertained to Survey plot No. 644. Learned counsel, therefore, contended that once it was found that the disputed land did not appertain to the plot of the defendant but that of the plaintiffs, the plaintiffs' suit should have been decreed. There is no force in this contention in view of the clear finding recorded by the court of appeal below that the plaintiffs have failed to prove either their title or much less subsisting title with respect to Plot No. 644. In this view of the matter, the plaintiffs' suit has been rightly dismissed by the court of appeal below.

10. For all these reasons, I do not find any merit in this appeal and would dismiss the same with costs.