
(1970) 07 AHC CK 0007
In the Allahabad High Court
Case No : Civil Rev. No. 1480 of 1968

Brij Gopal Sharma and Others	Vs	APPELLANT
Jagdish Nath Sharma and Others		RESPONDENT

Date of Decision : 30-07-1970

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 22 Rule 3

Citation : (1970) 40 AWR 630

Hon'ble Judges : B.D. Gupta, J

Bench : Single Bench

Advocate : S.S. Verma s, for the Appellant; S.N. Verma for opp. parties, for the Respondent

Final Decision : Dismissed

Judgement

B.D. Gupta, J.—This is an application in revision u/s 115 CPC hereinafter referred to as the Code, against an order passed by the 1st Addl. District Judge, Allahabad, on 25-5-1968, whereby he has accepted a prayer for bringing on record the legal representatives of a person arrayed as a Respondent in an appeal pending before him. After hearing learned Counsel for the parties at considerable length I am of the opinion that this revision must fail.

2. The Plaintiff opposite party Jagdish Nath Sharma brought a suit in the court of the Civil Judge in 1954. The relief claimed was partition of a 1/6th share in certain property on the assertion that the property was ancestral and the Plaintiff, as a member of the family, was entitled to a 1/6th share therein. According to the pedigree set forward in the plaint there were three extent branches of the family, each branch being entitled to a 1/3rd share. Plaintiff's claim was that he and Defendant No. 12 were entitled to a 1/6th share each, that Defendants Nos. 5 to 10 were, between themselves entitled to a 1/3rd share, whereas the remaining 1/3rd share represented the interest of the third branch consisting of Defendants Nos. 1 to 4. One Smt. Kishen Devi, arrayed as Defendant No. 11, was the widow of a predeceased uncle of the Plaintiff, whereas

the remaining Defendants were impleaded on the assertion that they were tenants on the property which was the subject-matter of partition. Plaintiff's case was that the property, which was the subject matter of the claim, was in possession of the Defendants first set consisting of Defendants Nos. 1 to 4 who alone contested the suit asserting that after the death of the common ancestor of the parties a separation between their sons had taken place. Various other pleas were put forward which need not be detailed herein. Some of the other Defendants, including Shiv Shanker Sharma arrayed as Defendant No. 5 in the plaint, put in a joint written statement whereby they substantially supported the Plaintiff's case. By judgment dated 24-4-1957 the suit was dismissed principally on the ground that it suffered from the defect of partial partition as the entire property had not been included in the claim with the further finding that in regard to certain items of the property included in the plaint the Plaintiff could not claim any share. An appeal was filed by the Plaintiff. During the pendency of the appeal the 5th Defendant Shiv Shanker Sharma, who was arrayed as the 5th Respondent in the memo of appeal, died on 15-1-1963. Thereafter on 16-1-1968, an application was made on behalf of the widow and two daughters of Shiv Shanker Sharma praying for substitution of their names in place of Shiv Shanker Sharma. This was followed, on 10-2-1968, by an application on behalf of the Plaintiff Appellant praying for the same relief. It may be added here that there is no controversy that Shiv Shanker Sharma left no male issue and that the only heirs he left consisted of the widow and the daughters who had made the application for being impleaded on 16-1-1968. The application was contested on behalf of Defendants Nos. 1 to 4. By order dated 25-5-1968, the learned Addl. District Judge granted the prayer contained in the two applications mentioned above. This revision has been filed against the aforesaid order on behalf of Defendants Nos. 1 to 4, arrayed in the memo of appeal as Respondents Nos. 1 to 4 and the principal contention raised on behalf of the Applicants is that by reason of failure on the part of the Plaintiff Appellant to make an application for impleading the heirs and legal representatives of the deceased Defendant No. 5 within time, abatement of the appeal as against the 5th Respondent had taken place bringing about the result that the whole appeal must be deemed to have abated. Reference has been made by learned Counsel to the provisions contained in Order 22 of the Code as also to certain decisions. Learned Counsel for the opposite parties has, on the other hand, contended that the order sought to be revised by this petition does not call for interference because, even though the said order may not be an order passed in proper exercise of the inherent powers possessed by a court it is, nevertheless, well supported by the provisions contained in Rule 10 of Order 1 of the Code.

3. The order passed by the learned Addl. District Judge does not make it clear as to whether he intended by that order to allow the prayer as on behalf both of the Plaintiff Appellant and the widow and daughters. Learned, counsel for the opposite parties has, however, not supported the order on the footing that thereby the learned Judge accepted in the prayer in so far as it had been made

on Plaintiff's behalf. His contention was that, assuming that the Plaintiff's application for impleading the heirs of Respondent No. 5 had been filed beyond time, there was nothing to prevent the heirs of that Respondent from applying to be impleaded as party to the appeal whilst it was still pending and further, that there was nothing to prevent the learned Judge from accepting such prayer in order to enable him to effectually and fully adjudicate upon the controversy before him. The aforesaid contention is based principally on the ground that it was a suit for partition to which considerations applicable are substantially different from considerations that apply to suits of other nature.

4. It is a well settled proposition of law that no decree for partition can be made in the absence of any co-sharer interested in the property and there being no controversy that the widow and the daughters of the 5th Defendant Shiv Shanker Sharma were the heirs and legal representatives of Shiv Shanker Sharma deceased, I have no doubt that the order passed by the learned Judge is perfectly correct and does not call for interference.

5. A number of cases were cited at the hearing of the revision but I propose to refer only to those few which, to my mind, have a direct bearing on the question in issue. It may be stated at the very outset that, in view of a number of recent decisions, learned Counsel for the opposite parties conceded his inability to support the order of the court below as one passed in exercise of its inherent powers, but learned Counsel contended for the proposition, about which there can be no controversy, that if the said order can be supported by provisions contained in the Code, even though not referred to or relied upon by the learned Judge, no case for interference with the order is made out.

6. Two decisions referred to by learned Counsel for the Applicants may be mentioned. The first is a decision of the Nagpur High Court in the case of Ramnath Kisanlal v. Ramgopal Bhaulal AIR 1951 Nag 434 and the second is a decision of the Patna High Court in the case of Jamuna Rai and Others Vs. Chandradip Rai and Others, . The question of abatement came up for consideration with reference to a partition suit in the aforesaid cases. In the case of Ramnath Kishanlal one of the contesting Defendants, against whom relief had been claimed by the Plaintiff, had died during the pendency of an appeal, against the decree of the trial court where, by Plaintiff's claim had been dismissed. It was held that failure on Plaintiff's part to apply for bringing the legal representatives of the deceased on record within time led to the result that abatement of the appeal as a whole took place. In the case of Jamuna Rai and others a preliminary decree in a partition suit had been passed by the trial court. During the pendency of an appeal from that decree filed on behalf of the contesting Defendants one of the Appellants died but no steps had been taken for substituting the legal representatives of that Appellant whereafter some steps were taken on behalf of the remaining Appellants with a view to bring on record the legal representatives of the deceased. It was held that if no application under Rule 3 of Order 22 is made within time, the result was that the appeal as against

the legal representatives of the deceased Appellant would abate and that this result could not be circumvented by making those legal representatives parties to the appeal under Order 1, Rule 10 of the Code. In my opinion, the decision recorded by the learned Judges in the aforesaid cases cannot appropriately be applied to the present case for the reason principally that in the present case no relief having been sought by the Plaintiff against the deceased Defendant Shiv Shanker Sharma, it cannot be said that the decree passed by the trial court dismissing the Plaintiff's suit was a decree either in favour of or against the deceased Defendant. In the case of Ramnath Kishan Lal the decree of the trial court dismissing the Plaintiff's suit was a decree in favour of the Defendant who had contested the suit and had died during the pendency of an appeal against the decree of the trial court which was in his favour. Similarly, in the case of Jamuna Rai and others preliminary decree for partition which had been passed in Plaintiff's favour inspite of contest by the Defendants was the subject matter of the appeal filed by those Defendants one of whom died during the pendency of the appeal. The decree of the trial court was a decree not only in Plaintiff's favour but against the Defendants-Appellant who died during the pendency of the appeal. Consideration applicable to the above circumstances should not, in my opinion, be applied to a case like the present where no relief had been claimed against the 5th Defendant Shiv Shanker Sharma who had not contested the claim set for on ward on Plaintiff's behalf but had actually supported it. I understand the provisions contained in Order 22 to be intended for the benefit of the heirs and legal representatives of a person who, having died, his legal representatives, were nevertheless not brought on record within time and not for prejudicing the rights of such heirs or legal representatives, A partition suit should not proceed without all the parties interested in the property, which is the subject matter of the suit, being before the court to enable the court to pass an effective decree and no rule of limitation has been pointed out which might prevent a court from impleading a person or persons who had shares in the property which is the subject-matter of a suit for partition at any time, even at the appellate or the second appellate stage. Assuming that as against the deceased Respondent Shiv Shanker Sharma abatement of the appeal had taken place, that, nevertheless, would not bring about the result of abatement of the appeal as a whole. Plaintiff's right to implead the heirs of Shiv Shanker Sharma may be barred by limitation, but the same cannot be said as regards the heirs of the deceased themselves who desired to be impleaded in proceedings for partition of ancestral property in which, according to the Plaintiff's case, they had a share, nor as regard the powers of the court, Under Order 1, Rule 10 of the Code, to implead such heirs for the simple reason that their presence before the court was necessary in order to enable the court to effectually and completely adjudicate upon and settle all the question involved in the suit. The power of the court Under Order 1, Rule 10 of the Code has merely been mentioned in the concluding portion of the judgment recorded in the case of Jamuna Rai and Ors. v. Chandradip Rai and Ors. (supra) and whatever be the propriety of refusing to apply the aforesaid provisions to the facts of that case on

the view that resort should not be had to Order 1, Rule 10 of the Code for the purpose of circumventing the provisions of Rule 3 of Order 22 of the Code, I regret my inability to accept the applicability of the aforesaid observations to the facts of the present case. If the learned Judges intended to lay down that by reason of the provisions contained in Order 22 the power of the court Under Rule 10 of Order 1 of the Code is fettered and rendered nugatory, in circumstances like those in the present case, I respectfully differ from that view. I would add that in the present case no relief having been claimed by the Plaintiff against the 5th Defendant Shiv Shanker Sharma who died during the pendency of the appeal, no question of any inconsistent decrees arises and resort to the principle of abatement incorporated in Order 22 of the Code is out of place in a suit for partition like the present one.

7. Learned Counsel for the opposite parties referred to the principle incorporated in the decision recorded by the Privy Council in the case of AIR 1940 215 (Privy Council) in support of his contention that laches on the part of the Plaintiff Appellant in impleading the heirs of the deceased Respondent Shiv Shanker Sharma should not be held as leading to the result that these heirs themselves lost such rights as they had in the ancestral property. The aforesaid appeal to the Privy Council arose out of an administration suit in which the Plaintiff and the two ladies arrayed as Defendants were persons interested in a share in an estate. One of the aforesaid ladies arrayed as Defendant died leaving as her heir a daughter. No application to implead the said daughter was made within time and the suit abated as against the deceased lady. Thereafter the daughter of the deceased lady applied to be brought on record in place of her mother claiming share in the relief asked by the Plaintiff. Her prayer was allowed by resort to Rule 10 of Order 1 of the Code. The contention raised before the Privy Council was that by reason of the death of the particular lady Defendant abatement had taken place and that lady's daughter could not be brought on record. This contention was negated on the ground that both the deceased and her daughter were persons having interest similar to that of the Plaintiff and that though the Plaintiff by reason of laches may be supposed in certain circumstances to lose her rights as against them it is paradoxical to suppose that the Plaintiff's laches have deprived them of their rights. The learned Judges observed as follows:

There is nothing in Order 22 to take away their interest in the state of Ebrahimji and they could (so far as that order is concerned) have brought an administration suit of their own, notwithstanding any abatement of the Plaintiff's suit. The presence of some-one to represent Sakindboo's interest was very proper and highly desirable in the interest of every other party, but it is putting it too high to say that the suit could not possibly go on without her.

A little further it was observed that it would have been very bad practice if the daughter had not been joined as a party and that the order directing her to be made a party on her own application Under Order 1, Rule 10 CPC had been properly passed. Further on it was observed as follows:

The contention that the Plaintiff's suit had abated as a whole is fundamentally mistaken. It involves that the Plaintiff was claiming relief against Sakinaboo, that because Sakinaboo's heirs were entitled to resist the grant of this relief in the present suit by reason of the Plaintiff's laches, the Plaintiff could not be given relief against the present Appellants. No step in this reasoning can be justified.

In my opinion the principle embodied in the aforesaid decision of the Privy Council is fully applicable to the facts and circumstances of the present case and the order passed by the learned Judge, though purporting to be in exercise of inherent powers, is fully supported by the provisions contained in Order 1, Rule 10 Code of Civil Procedure. The order is eminently proper and just and no case for interference in revision has been made out.

8. Accordingly this revision is dismissed with costs.

9. Let the record of the case be sent to the court concerned without unnecessary delay.