

(1973) 02 GAU CK 0006

In the Gauhati High Court

Case No : Second Appeal No. 56 of 1970

Chitradhar Gogoi and others

APPELLANT

Vs

Lalit Chandra Gogoi and others

RESPONDENT

Date of Decision : 06-02-1973

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151, 153

Citation : AIR 1974 Guw 2

Hon'ble Judges : R.S. Bindra, J

Bench : Single Bench

Advocate : J.K. Baruah, for the Appellant; J.P. Bhattacharjee, B.R. Dey and P. Goswami, for the Respondent

Final Decision : Dismissed

Judgement

R.S. Bindra, J.—The sole point which arises for determination in this second appeal filed by the heirs of the deceased-defendant is whether an appeal on behalf of the sole appellant who had died before it was filed can be availed of by his legal representatives. The first appellate Court has held that such an appeal cannot be resuscitated.

2. The suit was decreed by the trial Court on 23-9-66 against the defendant Harakanta Gosoi. An appeal on behalf of the defendant was filed in the Court of the Assistant District Judge on 15-11-66. However Harakanta had died earlier on 10-11-66. It was on 3-1-67 that the legal representatives of the deceased-defendant moved the Assistant District Judge with a prayer for their being brought on the record vice Harkanta. That prayer rested on the Court's inherent power under Sec. 151 C.P.C. However the Court declined to exercise such powers and probably it was influenced in the decision it took by the fact that by the date the legal heirs approached the Court the appeal was barred by time.

3. In this Court Sri J. K. Baruah the learned counsel for the appellants has placed reliance on the Provisions of" O. 1, Rule 10. C.P.C. to support the contention that

the prayer of the legal representatives should have been granted by the Assistant District Judge inasmuch as there is no difference in law between a plaintiff or an appellant suing in wrong name and the suit or appeal being filed in the name of deceased plaintiff or appellant. This view is contested by Sri P. Goswami on behalf of the plaintiff-respondent. After examining the authorities cited at the Bar I feel that there is no merit in the contention raised on behalf of the appellants.

4. Sub-rule (1) of Rule 10, O. 1. provides that where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, the Court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake and that it is necessary for the determination of the real matter in dispute so to do order any other person to be substituted or added as plaintiff upon such terms as the Court thinks just. A plain reading of the sub-rule brings out that there is some person in existence in whose name the suit had been filed- A suit filed in the name of a non-existent person, I feel satisfied would not fall within the ambit of sub-rule (1). The matter does not appear to be *res integra*. The Bombay High Court held in *Bai Pani Vankar Vs. Madhabhai Galabhai Patel*, . that an effective order under Order 1, Rule 10, can only be made provided there is an appeal before the Court, but if the appeal is a nullity such as when it is preferred by the pleader of a person after his death, then any order made in that appeal is equally a nullity. The appeal thus being a nullity, an order for substitution of a legal representative in place of the deceased appellant cannot be made.

5. The latest judgment cited at the Bar covering the point at issue is reported in *Amar Kaur and Others Vs. Sadhu Singh and Others*, . It was held by the Division Bench of the Punjab High Court in that case that the appeal filed in the name of a person, who was dead on the date of the institution, by a counsel purporting to act on the power of attorney given to him by the appellant's wife, could not be continued by permitting his legal representatives to be substituted in his place as appellants. Such an appeal filed in the name of a dead person being a nullity cannot be resuscitated either under Order 1, Rule 10 or Sections 151 and 153 of the Code.

6. Sri J. K. Barua has placed reliance primarily on two reported cases, one of the Madras High Court and the other of the Nagpur High Court in support of his submissions. The first case is reported in *Adusumilli Gopalakrishnayya and Another Vs. Adivi Lakshmana Rao*, , while the Other is reported in AIR 1938 458 (Nagpur) . The Madras case is clearly distinguishable on facts for the appeal had been presented not on, behalf of a deceased-appellant but against a deceased respondent, and by now it is well settled that an appeal against a dead person, as distinguished from a suit against a dead person, is not a nullity. Therefore, nothing said in the Madras case is of help in deciding the matter that falls for determination in the present appeal.

7. The facts of the Nagpur case were that a suit filed by the Manager of the Court of Wards on behalf of a ward was found to be defective inasmuch as instead of

writing the name of the ward Lal Bhanu Pratap Singh, the name of the latter's father, Giriraj Singh who was already dead, was mentioned. The Court allowed the prayer for rectification of that mistake by substituting the name of Giriraj Singh by that of Lal Bhanu Pratap Singh and this was done on the strength of provisions of Order 1. Rule 10, C.P.C. The Court clearly observed that the power of the Court could be invoked if only the mistakes were bona fide and if the prayer could be allowed without doing injustice to the opposite party. The High Court recorded the finding that the mistake in mentioning the name of the father instead of the son had crept in by inadvertence and as such it was bona fide.

8. It was further held in the Nagpur case that since the suit was one for immovable property and the period of limitation had not run out by the time the prayer for rectification was made, no injustice would be done to the defendant by allowing the prayer. However, in our case it is not denied that by the time the legal representatives of Harakanta approached the Assistant District Judge for substitution of their names vice Harakanta the period for filing the appeal had run out. The legal representatives of Harakanta also failed to satisfy the first appellate Court that the appeal had been filed in the name of Harakanta on account of some bona fide mistake. Therefore, the decision of the Nagpur High Court is also of no avail to the appellant.

9. The upshot of my conclusions reached above is that an appeal in the name of a deceased appellant is a nullity and still-born and consequently no life can be infused in it. Therefore, the present appeal is without merit and so I reject the same. However, since the point involved in the appeal is not covered by any decision of this Court, and since there is no unanimity between the other High Court of India, I leave the parties to bear their own costs in this Court as well as in the Courts below.