
(1966) 02 PAT CK 0011
In the Patna High Court

Dakho Prasad Singh and Others

APPELLANT

Vs

Bajnath Sah and Others

RESPONDENT

Date of Decision : 07-02-1966

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 145, 145(6)

Citation : (1966) CriLJ 1098

Hon'ble Judges : S.N.P. Singh, J;H. Mahapatra, J

Bench : Division Bench

Judgement

H. Mahapatra, J.—Defendants 1 to 4 are the appellants. The suit against the defendant No. 5 who is dead and defendants 6 to 9 who were described as defendants second party and are respondents 4 to 7 in this appeal was for declaration of plaintiffs title to and recovery of possession of the land in suit with damages. It was alleged that, in a proceeding u/s 145 of the Criminal P.C., which ended on the 28th January 1958, it was declared that the second party in that proceedings, who are defendants, first party (defendants 1 to 5) in the suit, was entitled to possession of the suit land. Plaintiffs claimed that they had title, and for that they were entitled to be in possession of the land in dispute and the possession of the defendants first party (defendants 1 to 5) was not justified in law and the order passed in their favour u/s 145 of the Criminal P.C., was illegal. While the suit was pending defendant No. 5 died on the 20th December 1958. Defendants 1 to 4, the remaining members of the defendants first party, made an application on the 18th November 1959, stating that defendant No. 5 was dead and that, in the absence of substitution of his legal representatives in his place the whole suit had abated.

The trial Court held that defendant No. 5 was interested in the suit property and his interest was inseparable His father was shown in Register D in respect of Tauzi No. 2290 in which the disputed land lies As there was no substitution, after the death of defendant No. 5, of his legal representatives, the learned Munsif held that the suit was not properly constituted in the absence of defendant No.

5's legal representatives and it was, therefore, dismissed. Against that the plaintiffs came in appeal to the Court below, where it was held that defendant No. 5 was really and in substance a pro forma defendant, and, if at all, the suit had abated only against his legal representatives. His heirs could be added if necessary as parties under Order 1, Rule 10 of the Civil P.C., and, in that view, the lower appellate Court thought that the whole suit had not abated and it remanded the suit for trial to the Court below. Against that, defendants 1 to 4 have come up in appeal to this Court.

2. The only point for consideration is whether, in the circumstances of the case, the suit can be said to have abated as a whole. Sub-section (6) of Section 145 of the Criminal P.C., lays down that, if the Magistrate decides that one of the parties was in possession of the subject matter of the proceeding, he shall issue an order declaring such party to be entitled to possession thereof until evicted therefrom in due course of law. In this case, admittedly, the final order under Sub-section (6) of Section 145 was to the effect that defendants 1 to 5 of the suit were entitled to possession of the land in dispute and they were entitled to retain their possession until evicted therefrom in due course of law. To get over this difficulty the plaintiffs brought the present suit to evict defendants 1 to 5 from the land. Learned Counsel appearing for the plaintiffs-respondents urged that defendants 1 to 4 belonged to one family Defendants 2 to 4 being., sons of defendant No. 1 and defendant No. 5 belonged to another family, although they descended from one common ancestor.

That may be so, but all of them were members of the second party in the proceeding u/s 145, Criminal P.C. and all of them were held entitled to possession of the suit land. In other words, they were entitled to joint possession. Learned Counsel view our attention to Para, 2 of the plaint in which the plaintiffs stated that defendants 1 to 4 were members of the joint family and, as such they were impleaded as parties in the suit in the capacity of their being the representatives of their joint family. In regard to defendant No. 5, it was stated in that paragraph that he was agnate and helper of defendants 1 to 4. As, in the case u/s 145, Criminal P.C., against the decision of which the present suit was instituted, defendants 1 to 5 were placed in the category of second party, they were impleaded as defendants first party in the suit for self and as the head members and representatives of their respective families.

As to the defendants second party in the suit, it was stated that they were not parties in the proceeding u/s 145, Criminal P.C., but as they used to take steps in the said proceeding as helpers and unauthorized persons, they were impleaded in the suit as pro forma defendants to avoid all disputes in future. In the relief portion, the plaintiffs asked for the declaration that the plaintiffs had absolute title to the disputed property, and that the defendants had no right or title to dispossess the plaintiffs or to keep possession and occupation over the property involved in the suit. They asked for a decree for recovery of possession in their favour by dispossessing the defendants. Their relief?s also included a prayer for

manse profits against the defendants. It thus appears clearly that the entire suit was directed against defendants 1 to 5 and no distinction was made by the plaintiff in regard to any one of them, much less defendant No. 5.

3. On the death of defendant No. 5, his legal representatives remained entitled to possession of the suit and as ordered u/s 145(6), Criminal P.C. If the suit is allowed to proceed against defendants 1 to 4 only and, ultimately, decreed against them, the legal representatives of deceased defendant No. 5 will not be bound by that and their right to claim and retain possession over the disputed land will remain unassailed.

In other words, the order u/s 145(6), Criminal P.C. declaring that the plaintiffs were not entitled to possession of the land and that defendant No. 5 along with defendants 1 to 4 was so entitled will remain good and unaffected, although in the present case, there may be a finding in that respect in favour of the plaintiffs and against defendants 1 to 4. This will lead to a very conflicting position which cannot be countenanced by the Court. If the interest of defendant No. 5 could have been shown to be separable from that of defendants 1 to 4 either as claimed in the case u/s 145, Criminal P.C or as found therein the position would have been different and the entire suit would not have abated even though defendant No. 5 was not substituted by his legal representatives after his death. Learned Counsel was not able to show that that was the position. In that view, it will be difficult to sustain the order passed by the lower appellate Court that the whole suit had not abated. It was wrong on its part to say that defendant No. 5 was really a pro forma defendant. There was no material to justify that inference.

4. Learned Counsel appearing for the plaintiff-respondents took up another point and contended that, on the allegations in the plaint the defendants first party were joint tort-feasors in the sense that they forcibly dispossessed the plaintiffs from the land in dispute and were sought to be evicted therefrom through processes of Court. In that event it was open to the plaintiffs to proceed against all the defendants first party or any one of them because the tort committed by them was joint and several. There cannot be any dispute that the plaintiff has the right to sue any one of the several joint tort feasors. But in the case of this nature, defendants first party (defendants 1 to 5) cannot be said to be joint tort-feasors.

Even the paragraph which stated the cause of action of the suit in the plaint referred to the 28th January, 1958, on which date the order u/s 145 of the Code of Criminal Procedure was passed, as being the date of the cause of action. No doubt, the dispossession of the plaintiffs by the defendants was also alleged to be cause of action, but that dispossession was in accordance with the order passed u/s 145 and therefore un-lawful. Therefore, reading the plaint as a whole the cause of action of the present suit was the order passed u/s 145 against the defendants declaring the defendants first party to be entitled to possession and not be interfered with by the plaintiffs or any other person. In that view, it cannot be accented that on the facts of the case or on the allegations made in

the plaint, the defendants first party were tort-feasors. Learned Counsel wanted to rely upon two decisions of this Court in Gajo Singh v. Amrit Singh AIR 1921 Pat 350 and Digvijay Narain Singh v. Bighuath Panday 1958 B.L.J.R. 445 to support his contention about the maintainability of a suit against some of the joint tort-feasors, but on the facts of this case, these decisions are not applicable.

5. Another point pressed for the respondents was that in view of what defendants 1 to 4 stated in paragraph 9 of their written statement about defendant No. 5, they are estopped from taking the present stand. In that paragraph, they stated that defendant No. 5 had no interest in the land and was unnecessarily made a party by the plaintiff in the suit. Similar statement was about defendants second party. If according to defendants 1 to 4, defendant No. 5 was not a necessary party, learned Counsel argued his death would be of no consequence to the whole suit. Whether the suit had abated or not is to be determined on the plaintiffs' case and not on the defendants' version of their title. Denial by the defendants will not alter the legal position of the defendant No. 5 under the orders passed in the case u/s 145, Criminal P.C. It is only after the decision is given on the different issues in a suit, the veracity or otherwise of the defendant's version would be found. If the plaintiffs' case as revealed from the plaint would have made out that defendant No. 5 had no interest whatsoever, in the suit land and if they did not claim any relief against him, the position would have been different. From the plaint, it appears that defendant No. 5 was a necessary party during the trial of the suit.

At that stage, the court could not have held that on the plaintiffs' allegations, the suit did not abate. If defendant No. 5 was a necessary party, the suit was bound to fail in his absence or in the absence of his legal representatives. On the plaintiffs' case and on the orders passed u/s 145 of the Code of Criminal Procedure, the suit could not proceed in the absence of the legal representatives of defendant No. 5, as rightly held by the trial court. The death of one of the necessary parties was only brought to the notice of the court by the application of defendants 1 to 4 made on the 18th November 1959. It was for the court to decide whether the suit could proceed in that state. What the defendants first party (defendants 1 to 4) said was that, on the plaintiffs' own case, the suit had abated. I do not think that they were not entitled to take that stand even if their case in the written statement is literally taken to mean to deny the defendant No. 5's interest in the land.

8. Learned Counsel's further argument was that defendant No. 5's legal representatives did not object to the proceeding of the suit in their absence. Neither they were noticed by this Court nor by the lower appellate or the trial courts. It appears from the order recorded in the trial court on the 15th July 1960 on a petition under order 22 Rule 9 of the CPC filed by the plaintiffs that notice of that application was served on the defendants of the suit. We wanted to know if that notice was also served on the legal representatives of deceased defendant No. 5. But learned Counsel was not able to show that it was served on

them.

7. I am, therefore, clearly of the view that the whole suit had abated as the legal representatives of deceased defendant No. 5 were not substituted and brought on the record as party defendants in the case. The judgment passed by the lower appellate court is set aside and that of the trial court restored. In the circumstances of the case, however, there will be no order for costs.

S.N.P. Singh, J.

8. I agree.