
(1945) 02 AHC CK 0032
In the Allahabad High Court
Case No : Miscellaneous Appeal No. 12 of 1911

Deputy Commissioner, Partabgarh

APPELLANT

Vs

Nand Lal Manucha and Others

RESPONDENT

Date of Decision : 06-02-1945

Acts Referred:

Encumbered Estates Act, 1934 — Section 4, 50

Citation : (1945) 02 AHC CK 0032

Hon'ble Judges : Misra, J; Madeley, J

Bench : Division Bench

Advocate : M.H. Qidwai, for the Appellant; R.N. Sinha holding brief of Mr. P.L. Verma, for the Respondent

Final Decision : Allowed

Judgement

Misra and Madeley, JJ.—This judgment will cover two connected appeals Nos. 12 and 37 of 1941 against orders under Encumbered Estates Act. One order was to the effect that the whole proceedings had abated and the other was an order refusing to set aside the abatement. The appellant in both is the applicant u/s 4 while the respondents are the creditors. The applicant was Raj Krishna Pal Singh. The Court of Wards took over the estate. The creditor who died was Lachhman Das and his legal representative who was not brought on the record within 90 days is Jagannath Prasad, respondent No. 31 in both the appeals. Lachhman Das died - on the 10th April, 1939, after filing his claim. At that time an appeal was pending in the Chief Court against a miscellaneous order, and the file had therefore been sent for to this Court. That appeal was decided on the 17th August, 1939-A No substitution had been made in place of Lachman Das. The first date fixed before the Special Judge after the return of the record from the Chief Court was the 31st August, 1939. On the 5th August, 1940, Jagannath Prasad, the present respondent No. 31, applied to have his name brought on the record as legal representative of Lachhman Das. In this application he does not mention the date of the death of Lachhman Das, but states that he is son and

heir of the deceased and in possession of the deceased property. No one objected to the substitution which was duly made on the same date. On the 19th August, 1940, Jagannath Prasad applied "stating that his father had died on the 10th April, 1939, and that no application had been made by the debtor applicant for bringing the legal "representative on the record within limitation and he prayed that, although his name had been brought on the record as legal representative, since there was a legal defect, the whole proceeding should be held to have abated. Two questions arose before the trial Court;

(1) What was the date of the death of Lachman Das, and (2) What was the effect of Jagannath Prasad's name being already on the record ? These questions were treated as preliminary issues. The question whether the _ applicant u/s 4 had knowledge of the death of Lachhman Das before the 5th August was raised by the applicant, but the trial Court refused to take evidence on this point as _ there were no pleadings sufficient to raise an issue.

2. The trial Court found that Lachhman Das died on the 10th April 1939 and that the application had abated as against Jagannath Prasad long before the 5th August, 1940. It further held that in view of Bhaiya Udai Pratap Singh v. Dwarha Prasad", the application had abated as a whole. It was true that an application for setting aside the abatement could have been considered, but no such application was before the Court. On the 5th November, 1940 the applicant u/s 4 applied for setting aside the abatement. This application was dismissed.

3. Appeal No. 12 is the appeal against the order that the application has I abated, and appeal No. 37 is the appeal against the order dismissing the application for setting aside the abatement.

4. Bhaiya Udai Pratap Singh v. Dawarka Prasad 1940 O A 648 : A W R (C C) 352 : QWN 522 was an appeal by the applicants u/s 4 whose application had been dismissed by the Special Judge under Proviso (a) to sub-Section (1) of Section 4 of the Encumbered Estates Act. During - the pendency of the appeal two of the creditors died and the applicants appellants failed to implead their legal representatives within time so that the appeal abated as against those two creditors. The learned Bench which tried the appeal remarked :

On behalf of the appellants it is not disputed that the effect must be that the appeal has abated against those two respondents, but it is contended that the appeal can proceed as against the other creditor-respondents. The necessary result would, " of course, be that if this appeal should . succeed and the order of the learned Special Judge be set aside (as indeed it would probably have to be in view of certain other decisions of this Court) the proceedings would continue under the Act in respect of some creditors, but could not proceed against other creditors.

5. The learned Bench then points oat that those other creditors would be unable to proceed to realize their debts in course of the ordinary law on account of Section 7 (1) (b) and perhaps also of Section 13 of the Act. After further

discussion it was held that the only solution was to hold that the appeal had abated as a whole.

6. In applying this ruling to the present case the lower Court has failed to notice the very great difference which exists between original proceedings and appeals under the Encumbered Estates Act. As the learned Judges who heard the appeal "in *Bhaiya Udai , Pratap Singh v. Dwarka Prasad*¹ remarked the Act contains many anomalies, and whereas at the beginning of the proceedings the applicant u/s 4 is seeking relief and is in the position of a plaintiff in a suit, later on when the coeditors have filed their claims and are seeking decrees in their favour it would be difficult to hold that they were any longer in the position of defendants. We consider it doubtful therefore whether it can be said that it is the duty of the applicant u/s 4 to watch over the creditors in the trial Court and to see that none of them dies without his legal representative being brought on the record. The duty" would seem to lie upon the legal representative of the creditor who has filed his claim.

7. Besides this, though the Encumbered Estates Act provides when appeals do and do not lie, the procedure for the hearing of appeals is regulated by the Civil Procedure Code, whereas the Encumbered Estates Act lays down its own procedure for the hearing of cases in the trial Court to a very large extent, and the CPC applies only where its provisions are not inconsistent with or repugnant to the Encumbered Estates Act. In the Encumbered Estates Act there is no provision for the abatement of the proceedings as a whole or in part. We do not wish to express any opinion as to whether the claims of a deceased creditor does or does not abate, if his legal representative is not brought on the record in time/ but we feel certain that the idea of the application u/s 4 abating as a whole before the Special Judge is entirely repugnant to the provisions of the Encumbered Estates Act. In the case of the death of the landlord applicant it is expressly laid down in Section 50 of the Act that the proceedings cannot abate.

If a landlord with regard to whom a notice has been published u/s 8 dies before a declaration has made in respect of him u/s 44-

(a) the proceedings under this Act shall be continued as nearly as may be possible in- all respects as if the landlord were still living, and

(b) any person succeeding to the whole or any portion of the landlord's property shall become subject in respect of that property to the disabilities imposed by sub-Section (U) of Section 9 and shall continue so subject until a declaration made in respect of him u/s 44.

8. Why should they abate therefore on the death of a creditor ?

9. The learned Special Judge has failed to notice that while an appeal by the debtor-applicant is initiated by a memorandum of appeal, the case before the Special Judge is initiated, not by the application u/s 4 (which is made before the Collector), but by the order of the Collector u/s 6 of the Act forwarding the case

to the Special Judge. After this order has been passed all the disabilities imposed upon both the debtor applicant and the creditors are only removed in circumstances specified by the Act itself in Sections 43 and 44. These sections contain nothing about abatement of the application. What then has become of the order u/s 6 and the disabilities attaching to the landlord and the creditors in consequence thereof if the proceedings are held to have abated as a whole ?

10. The respondent's learned Counsel has attempted to meet this argument by saying that, as the order u/s 6 was passed upon the application of the landlord-debtor, if the application abates, then the order u/s 6 and the proceedings following it are null and void. But the application by which the landlord initiated proceedings before the Collector did not abate. On the contrary it was successful and resulted in the order of the Collector u/s 6 which initiated proceedings before the Special Judge. In our opinion the application of the principle of abatement to that order is entirely unsuitable and indeed impossible. It seems to follow that in no circumstances can the proceedings before the Special Judge abate as a whole.

11. Another reason for allowing this appeal is this. Jagannath Prasad himself applied to be brought on the record as the legal representative of Lachhman Das, and his application was successful. He then applied that the appeal be held to have abated as a whole because Lachhman Das", legal representative was not brought on the record within time. Admittedly he could not have made this application if he had not been brought on the record since he would have had no further interest in the case. Yet it is argued on his behalf that he can defeat the application of the debtor applicant on the ground of abatement without challenging the validity of the substitution of Lachhman Das" legal representative. In our opinion it is not open to him to adopt this attitude. If he was legally and properly brought on the record then the case could not have abated for the simple reason that Lachhman Das is legally and properly represented by him.

12. For these reasons we allow appeal No. 12 and set aside the order, termed an order of dismissal of the application u/s 4. The appellant will get his costs of this appeal and of the application of Jagannath to the lower Court that the proceedings had abated. The case will be returned to the lower Court for decision according to the merits. Since the order of abatement has been set aside in appeal No. 12, appeal No. 37 against the order dismissing the application for setting aside the order of abatement is also allowed. The appellant will get costs of that appeal and application too, but not separate counsel's fee in this Court.