

(1972) 09 DEL CK 0003

In the Delhi High Court

Case No : I.A. No. 493 of 1972, in Suit No. 66 of 1966

Devi Dayal and Others

APPELLANT

Vs

Bhupinder Kumar and Others

RESPONDENT

Date of Decision : 04-09-1972

Acts Referred:

Citation : AIR 1973 Delhi 290

Hon'ble Judges : Rajinder Sachar, J

Bench : Single Bench

Advocate : P.L. Sood, for the Appellant; Balmukand Gupta, for the Respondent

Judgement

1. This suit was file by Devi Dayal (who has since been substituted by his legal representatives) for the recovery of Rs.2,50,000/- . It was alleged in the suit that one Ch. Ram, Narain Bishnoi took from the plaintiff loaned totaling Rupees the plaintiff on the said dates. It was also stated in para 4 of the plaint that about a year back Ch. Ram Narain died and the defendants are his sons and legal representatives of his estate and are bound to pay the just debts of their father. A decree fro Rupees 2,50,000/- comprising of Rs. 1,43,000/- as principal and Rs. 1,07,000/- as interest was Therefore prayed. Suit was filed on 18-1-1965. In the suit when the evidence was being taken on commission on 6-2-1971 the advocate for the defendants made a statement that Banwari Lal, defendant made a statement that Banwari Lal, defendants NO.2 had died by failure of heart on 31-1-1971. On this the advocate for the plaintiff stated that the case could be proceed in the absence of the deceased defendant the case was, Therefore, adjourned for further proceedings. On this the Commission adjourned the matter and returned the proceedings to the court for further necessary action.

2. I. A. 492/72 dated 2-3-1972 had been file din which is stated that as three defendant had been used jointly as representing the estate of their father, Ch, Ram Narain, and the plaintiff having taken on steps to bring the legal representative of deceased, defendant No.2, on record the suit of the plaintiffs has abated altogether as the right to sue did not survive against the other two

defendants as their liability if any was joint and indivisible.

3. A reply has been filed on behalf of plaintiffs. The factum of death of defendant No.2 is not denied. The liability of the sons is stated to be not personal and is only confirmed to the share of each son enjoined by him of the ancestral property. The liability is, Therefore, stated to be joint and several and the right to sue survives against the other two defendants. It is denied, Therefore, that there is any abatement.

4. The position thus boils down to this that the suit was filed against three defendants, each representing the estate of Ch. Ram Narain who was alleged to have taken the loan from the plaintiff. Admittedly defendant No.2 died on 31-1-1971 but no legal representative of the deceased had been brought on record. The question that arises in these circumstances is whether the suit has abated partly or wholly or not at all.

5. The contention of Mr. Gupta, learned counsel for defendant Nos. 1 and 3 is that the liability of all the three defendants was heirs of Ch. Ram Narain was joint and indivisible and as defendant No. 2 has died and his legal representatives have not been brought on record the suit abates as a whole. Mr. Sood, learned counsel for the plaintiffs, however, maintains that the liability of defendants 1 to 3 was jointly and several and, Therefore, it was open to him even in the first instance to file a suit against any one of the sons of Ram Narain without impleading other sons and, Therefore, the fact that one has been brought on record is of no consequence and the suit can proceed in their absence.

6. Now as regards the liability of an heir of a deceased Hindu to pay the debts of the deceased, it is settled law that he is liable only to the extent of the assets inherited by him from the deceased. The heir is not personally liable to pay the debts of the deceased vide para 288, Hindu Law by Mulla, 13th Edition. Also under the Hindu Law, according to the Mitaksharan school two or more persons inheriting jointly taken as tenants-in-common vide para 31 Hindu Law by Mulla.

7. The main question, Therefore, that arises is whether it was open to the plaintiffs to have filed the suit against any one of the sons of the deceased, Ch. Ram Narain. In other words, were all the heirs of the deceased necessary parties to the suit or were they only proper parties. It is apparent that if the answer is that all the heirs are not necessary parties but only proper parties then in the present case only a proper party has died while the other two defendants are on record will not result in the suit abating. But on the other hand, if all the heirs are necessary parties then obviously on the death of one of the defendants the right to sue does not survive to the defendant alone and if in that case the legal representatives of the deceased have to be brought on record within limitation the result must of necessity be that the whole suit will abate. This consequence follows because as we know, a necessary party is that without whose presence a decree can be passed while a proper party is that whose presence may be only necessary to enable the court to adjudicate more effectual and completely. Thus,

if a necessary party is not impleaded the suit cannot proceed where as if only a proper party is not added the suit can be continued in its absence. Mr. Sood however, maintains that the heirs of the deceased are in the position of the joint promisor and, Therefore, by virtue of Section 43 of the Contract Act, it is open to the plaintiff to perform the whole of the promise. The argument is that the liability of the joint and services suit could be filed against any one of the sons of deceased and the death of one of the sons i.e. defendant NO. 2 is, Therefore of no consequence. In this regard he refers me to *Chandar Bhan v. Mistrimal* Air 1955 Raj 11. In that case a suit had been filed against sons some of the sons of the deceased for the recovery of the amount of the deceased for the recovery of the amount of the due from the deceased. Objection was taken that all the sons had not been impleaded. The learned Judge, however, held that all the sons were not necessary parties to the suit as a creditor may bring a suit against some of the sons of a deceased Hindu father leaving aside the others and that if that its son such a suit need not be necessarily held to be bad for the other sons on the record. The learned Judge also observed, but it seems with respect, more as obiter, that the case of the co-share cannot be placed on a better or higher footing than that of co-promises on any principle, and that Section 43 of the Contract Act may well be held applicable in principle to the case of co-heirs, and in any event, to the kind of the heirs, who were sons in the person case. This view was also followed in *Mawaji Ramji v. Premiji Kumbhabhai Chanda* Air 1967 Ori 158. In that case plaintiff had filed a suit for the recovery of Rs.6,800/- on the basis of promissory note executed by the deceased, Ramji Haridas. The plaintiff had impleaded only the sons and not the daughters. Objection was taken that as the daughters had not been impleaded the suit was not maintainable. This was negatived and the bench held applying Section 43 of the Contract Act that it was open to the plaintiff to compel performance of whole of the promise from any one of the co-heirs who by operation of law became joint promisors after death of single promisor though sisters are not impleaded as parties to suit. The Bench did not agree with the earlier view taken in *Shaik Shahed v. Krishna Mohan* Air 1917 Cal 829, and purported to follow the Full Bench decision in *Kailash Chandra Mitra Vs. Brojendra K. Chakravarti and Others*, .

8. With respect, the view taken in above cases that Section 43 of the Contract Act will be applicable to the case of the co-heirs of the deceased is based on misapprehension of the scope of Section 43 of the Contract Act. It is quite apparent that the liability of a son for the debt incurred by the father is limited only to the extent of the share of the property inherited by him. Now one of the essential conditions for the applicability of Section 43 of the Contract Act is that it is open to a creditor to sue any one or all debtors whose liability is joint and several for the recovery of the whole of the amount. Take an illustration; if the amount claimed is Rs. 11/2 lakhs from these three joint promisors, it is open to the creditor to sue only one of them to obtain a decree for the full amount of Rs. 1 1/2 lakhs from him. Of course in such a case latter part of Section 43 of the Contract Act gives a right to such a person to compel contribution from other joint

promisor. But that is a matter inter se between the joint promisors. The real thing, however, is that creditor is not limited to recovering from one joint promisor only a proportionate amount but can recover the whole amount. Now applying this illustration to the case of a debt incurred by the deceased father which is sought to be realised from the three sons, it cannot be said that one son could have been sued for the recovery of the full amount even if the property fallen to his share was not sufficient to discharge the whole debt. Thus for instance that if the property left by the father was of the value of Rs. 75,000/- and the property was inherited by the sons then it is apparent that the liability of each son is only limited to Rs. 25,000/-. In such a case if the creditor was to sue one son it is not suggested that he can recover the whole of the debt due from the father even if the property in the hands of one son was very much less than the debt due. If that position is correct then it is not understood how the co-heirs of the deceased can be considered in the position of joint promisors and, Therefore per se liable not only jointly but severally for the whole debt. The essential prerequisite of a joint and several liability is that each of the promisors is liable for the amount due to the creditor. If in the illustration given by me above one son is not liable for the full amount but only for the proportionate amount due to his share it is quite obvious that he cannot be put in the position of a joint promisor. The heirs are in the position of having one indivisible debt due from the whole of the property which they have jointly inherited. It is not possible to split up the same for the purpose of making only one of them liable for the full amount due. The discussion in Chandra Bhan's case and Mawaji Ramji's case which follows it, about pious obligation of the son to make full payment of just debt of his father does not carry the matter any further. Even if the debt has not been incurred for unlawful or immoral purposes the liability of the son is confined only to their interest in the coparcenary property from the deceased father, the pious obligation does not extend to his discharging the debt due from the father and the creditor cannot proceed against the separate property of the son. If as the learned Judges themselves accept that the liability of each son is to the extent of the property inherited by him then it is not understood how it is further held that the liability of the sons is joint and several because several liability pre-supposes that the person is liable to clear off the whole debt irrespective of the extent of the property devolved on him. When the learned Judges accept that each son is only liable to the extent of the property inherited by him it obviously implies that the liability is joint and indivisible. The death of the deceased does not make all the heirs jointly and severally liable because the only difference caused by the death is to make liable instead of the deceased, the various heirs to the extent of property inherited and the liability is thus by operation of law transferred from one person to a number of persons who constituted in law one heir. It is for this reason that I cannot agree that Section 43 of the Contract Act is applicable in the case of the co-heirs of the deceased.

9. This view of mine find support from Shaik Sahed's case Air 1917 Cal 829

where it was held that Section 43 of the Contract Act can have no application where parties became jointly interested by operation of law in a contract made by a single person. It was in that case held that if the landlord brings a suit for recovery of rent without impleading all the tenants who are necessary parties, the suit is not maintainable. It appears that there was a conflict of views and the matter was referred to Full Bench in *Kailash Chandra Mitra Vs. Brojendra K. Chakravarti and Others*, . Minority judgment of C. C. Ghose and Mukerji, JJ., held that the heirs or successors-in interest of a deceased tenant are all necessary parties and the Lesser is bound to implead in his suit all the leasees. Mukerji, J., also held that the liability of all the persons on whom the tenancy devolves on the death of the original tenants is a joint liability to the extent of the interest which devolves and not a joint and several liability in respect of that interest. as the whole body of persons. who succeed in this way constitute in law but one heir. Mukerji. J., also held specifically that except in the case of original lessees or persons who were parties to the contract. the provisions of Section 43 of the Indian Contract Act have no application. Majority judgment was written by B. B. Ghose, J., with whom Walmsley, J., Graves, J. and Ghose. J., agreed and it took the view that all the heirs of the tenant took the property s tenants-in-common and that Therefore law imposes a liability for payment of rent by reason of privity of estates and any one of such tenants is liable for the payment of entire rent due to the landlord. The learned Judge also went on to observe and it seems with respect that it was completely obiter that this may be either in accordance with the provisions of Section 43 of Contract Act which applies to express as well as implied promises. or under the general law based on privity of estate. It will thus be seen that the majority judgment in *Kailash Chandra Mitra Vs. Brojendra K. Chakravarti and Others*, was based mainly on the reasoning that the liability of all the tenants on whom the rights have devolved is by privity of estate and responsibility of each of such tenants and. Therefore, they may be sued. The reasoning was that each of the tenants was entitled to possession of every part of the estate and thus there was privity between him and the landlord in the whole of the lease-hold. This reasoning is obviously distinguishable. The majority assumes that as one of the tenants has a privity with the landlord for the whole of the estate it is not necessary to implead all of them. The other two judges did not accept this view. Reference to Section 43 of the Contract Act was only in the nature of obiter and was not necessary because if as the majority held that there was a privity of estate there is a case which especially falls in the category of joint promisor and joint and several liability accrues. The question whether Section 43 of the Contract Act applies to the case of co-heirs of a deceased did not arise in that case. I have already given my reasons to show why it is not possible for me to agree with the reasoning given in *Mawaji Ramji and Others Vs. Premji Kumbhabhai Chanda*, which supported Chandra's case. Air 1955 Raj 11. In these two cases *Kailash Chandra Mitra Vs. Brojendra K. Chakravarti and Others*, was relied on. In my view the facts in the Full Bench case cannot be held to come to a finding that Section 43 of the Contract Act applies to the co-heirs of a deceased.

10-11. I may mention that Shasik Sahed's case AIR 1917 Cal 829 was referred to in D.N. Dutta Vs. Income Tax Investigation Commission and Others, Though it is true that this case was held not applicable to the facts of the case but it is however to be noted that the Supreme Court did not indicate that it was wrongly decided. I may also notice that in the earlier Calcutta case i.e. Siba Krishna Sinha Sharma v. Jagat Chandra Talukdar 45 Ind Case 732 : AIR 1918 Cal 145. Woodroffe, J.. held that a landlord cannot maintain a suit for arrears of rent against one of several heirs of a deceased tenant without joining the others as defendants and Section 43 of the Contract Act has no applicability to such a case.

12. My view finds support from the decision in Gurdas Mal v. Kashi Ram Air 1921 Lah 160 where it was held that where three persons were sued jointly as representing the estate of their late father, and their liability, if any, was joint and indivisible, and during the pendency of appeal by the plaintiff one of the defendants alone.

13. Same view was expressed in Hazara Singh v. Narinjan Singh Air 1929 Lah 783 by a Division Bench consisting of Shadir Lal, C. J. and Hilton. J., where it was held that Section 43 applies only where two or more persons have made a joint promise have become jointly interested by inheritance in a contract made by a singly person.

14. As a result of above discussion it has to be held that defendant No. 2 was a necessary party to the suit and the suit would not have been maintainable had he not been impleaded. He was, Therefore, correctly impleaded in the first instance. In a case where one or more defendants die and the right to sue does not survive against the surviving defendants alone and where within the time limited by law, legal representatives of the deceased defendant have not been made party to the suit. the suit shall abate as against the deceased defendant as provided in Order 22, rule 4, Civil P. C. As no legal representative of deceased defendant No. 2 has been brought on record the consequence is that the suit must be held to have abated as against deceased defendant No. 2. Now the question is that whether it can be held that this can be partial abatement or total abatement. In my view it cannot be held that the suit has only partially abated. This is because the consequence of a suit having been dismissed against defendant No. 2 is that he is not held liable for any amount which may be due from the deceased father because of the dismissal of the suit. If the suit is allowed to proceed against defendants 1 and 3 and a decree is passed for the entire amount they will not be in a position to sue for contribution as provided in Section 43 of the Contract Act in a subsequent suit because of the decision in the present suit by which the claim against defendant No. 2 and his legal representatives has been dismissed. This position must follow, because it is well settled that the Court would not countenance a situation where two contradictory decrees could be passed. In such a situation to hold that proceedings can continue against defendants 1 and 3 would really be as was stated in Kedar Nath Vs. L. Manak Chand and Others, in similar situation, to lead to an unfair situation

for them inasmuch as they would be deprived of the right of contribution against the legal representatives of defendant No. 2. They would thus not be in a position to have the contribution which is condition precedent to the applicability of Section 43 of the Contract Act. This also shows that Section 43 cannot be held applicable.

15. It is indeed surprising that though the information of the death of defendant No. 2 was available to the plaintiff within a week of this death as is clear from the proceedings before the commissioner yet no steps have been taken in order to bring the legal representatives on record. No reason has been suggested as to why even when the knowledge of death of defendant No. 2 was with the plaintiff the legal representatives were not brought on record. The suit originally framed was definitely on the allegation that all the sons i.e., defendants Nos. 1 to 3 are liable for the debt jointly due from them from the property inherited by them. Having definitely taken a stand that the sons are jointly liable it does look anomalous and strange that a complete reversal of the position is being now taken by contending that the liability of each son is a separate one. Such a position, however, is not maintainable in law as discussed by me above.

16. As a result of the above discussion it has to be held that the suit has totally abated and is. Therefore, dismissed as such. But in view of the circumstances of the case there will be no order as to costs.

17. Suit dismissed.