

(1977) 07 CAL CK 0043
In the Calcutta High Court
Case No : S.A. No. 397 of 1965

Doman Mia

APPELLANT

Vs

Kanai Lal Goswami and Others

RESPONDENT

Date of Decision : 28-07-1977

Acts Referred:

Citation : 82 CWN 24

Hon'ble Judges : N.C. Mukherji, J

Bench : Single Bench

Advocate : C.F. Ali, for the Appellant; Sailendra Bhusan Bakshi, for the Respondent

Final Decision : Dismissed

Judgement

N.C. Mukherji, J.—This is an appeal from the judgment and decree passed by Sri A. K. Chatterjee, Subordinate Judge, 2nd Court, Hooghly, dated 27.7.1964 in Title Appeal No. 188 of 1963 affirming those of Sri S. N. Mukherjee, Munsif. 1st Court. Chandernagore, dated 26.3.1963 in Title Suit No. 108 of 1960|187 of 1962.

The defendant is the appellant in this Court.

The case of the plaintiffs may briefly be stated as follows: --

The plaintiffs have retained in their khas possession the suit plot and upon the same a market known as Champdani bazar is situated. The defendant used to erect his tea stall daily on the kha schedule land and used to pay 5 annas as toll to the plaintiffs. The defendant has illegally erected a temporary shed on the land. Smoke coming out of the defendant's oven for making tea has damaged the plaintiffs' corrugated tin shed by the side of the defendant's kha schedule shed. The defendant has no right to stay. Hence the suit for eviction, and recovery of possession and damages.

The case of the defendant is that he took lease of one cottah of land at a rent of

Rs. 7-8 annas from one Deep Narain Sinha, who was plaintiffs' lessee of the champdani bazar and that on the expiry of Deep Narain Sinha's lease one Radhika Ranjan Bose became the lessee and the defendant's rental was raised at Rs. 9-6 annas by Radhika Ranjan Bose and that the defendant's tea stall is a permanent shed and that he is a non-agricultural tenant on the suit land and not a daily hawker of tea and that he has caused no damage to the plaintiffs' corrugated tin shed. The learned Munsif decreed the plaintiffs' suit holding that the defendant was a licensee and that the licence was revoked. The learned Subordinate Judge, however, held that the defendant is a trespasser and he used to pay a certain sum as toll daily to the plaintiffs having no right in the land. Being aggrieved, the defendant as filed the present appeal. During the pendency of this appeal respondent No. 3, one of the plaintiffs, died and his legal heir were duly substituted. But after that the respondent No. 2, another plaintiff, also died on August 5, 1972. By order of this Court dated 29th of May 1973 the appeal stood abated as against the respondent No. 2. Long after only on 25th of May 1977 an application was filed by the appellant for substitution of the legal heirs of the respondent No. 2 after setting aside abatement. This application after contested hearing was rejected by Anil Kumar Sen, J. on 2.6.77.

2. Mr. Sailendra Bhusan Bakshi, learned Advocate appearing on behalf of the respondents, takes a preliminary point, namely, that when the appeal has abated as against the respondent No. 2, i.e. one of the plaintiffs and as the three plaintiffs got a joint decree for recovery of possession, it must be held that the appeal has abated as a whole and the appellant therefore cannot proceed with this appeal. Mr. Bakshi submits that if the appellant succeeds in this appeal then the suit which was brought by the respondents Nos. 1 and 3 will be dismissed and the decree which has already been obtained by the respondent No. 2 will remain. Thus there will be two inconsistent decrees. Mr. Bakshi in this connection submits that the test whether an appeal abates in part or as a whole depends on the fact whether there may be two inconsistent decrees as a result of the decision of the appeal. In support of his contention Mr. Bakshi first refers to a decision reported in 30 C.W.N. 45 (Manindra Chandra Nandi v. Bhagabati Devi Chaudhurani and others). In this case the plaintiffs jointly sued for recovery of possession of certain lands on declaration of title thereto and obtained a decree for joint possession. The defendant appealed to the High Court. During the pendency of the appeal one of the plaintiffs-respondents died. The appellant applied after the period of limitation to have the abatement of the appeal as against that respondent set aside and for substitution of his legal representative. A Rule was issued but it was discharged. Thereupon the appellant filed an application to have the legal representative of the deceased respondent added as a party. At the hearing of the appeal a preliminary objection was taken to the competency of the appeal. It was held by Their Lordships that "The appeal was incompetent and could not proceed in the absence of one of the plaintiffs-respondents." It was further held that "Order 41 Rule 4 is limited to the case of appellants and does not entitle a person against whom the decree is passed to

have it varied in the absence of a person in whose favour it was made" The facts of the case are very much similar to the facts of the present case.

3. The next case cited by Mr. Bakshi has been reported in *Madhi Vs. Mahanbai and Others*, . In this case the two respondents as joint plaintiffs filed a suit for possession of the suit property. A joint decree was passed in favour of the plaintiffs. The defendant appealed against the decree. The first appellate court reversed the decree and dismissed the suit. The plaintiffs then went up in appeal to the High Court. The High Court reversed the decree of the first appellate court and restored that of the trial court. Thereafter the appellant brought the appeal by special leave. During the pendency of the appeal in the Supreme Court one of the plaintiffs who was a joint decree-holder died, but the appellant failed to bring her legal representatives on record. In such circumstances it was held that the appeal has abated and as such without entering into the merits of the appeal the appeal was dismissed. A similar point arose in a case before the Supreme Court reported in *The State of Punjab Vs. Nathu Ram*, . In this case certain land belonging to two brothers jointly was acquired for military purposes and on their refusal to accept the compensation offered by the Collector, the State Government referred the matter for inquiry to an arbitrator. The arbitrator passed a joint award granting a higher compensation. The State Government appealed against the award to the High Court. During the pendency of the appeal one of the brothers died and the legal representatives were not brought on record, and as the legal representatives were not brought on record the appeal abated against him. The question was whether the appeal also abated as against the other brother. It was held that "the appeal against the surviving brother alone could not proceed. To get rid of the joint decree it was essential for the appellant to implead both the joint-decree-holders and in the absence of one of the appeal was not properly constituted." Reference may also be made to a case reported in *union of india (UOI) Vs. Sree Ram Bohra and Others*, . In this case also two plaintiffs got a joint decree. The defendant preferred an appeal. During the pendency of the appeal one of the plaintiffs died. His heirs and legal representatives were not impleaded within the statutory period. The appeal abated as against the deceased respondent. It was held that the appeal against the other plaintiff-respondent becomes incompetent. In coming to this decision Their Lordships relied on an earlier decision reported in AIR 1962 S.C. 89 (*State of Punjab v. Nathu Ram*).

4. Mr. C. F. Ali, learned Advocate appearing on behalf of the appellant, contends that it is true that the appeal has abated as against the respondent No. 2. But the appellant can very well proceed against the other respondent inasmuch as the decree obtained by the plain tiffs was a decree for eviction of a trespasser and there can be a joint decree for possession along with the defendant. Mr. Ali has cited several decisions such as *Daya Ram and Others Vs. Shyam Sundari*, . But on going through those decisions I find that the principles laid down in those cases do not apply to the facts of the present case. Mr. Ali relies very much on two decisions of this Court reported in 68 C.W.N. 786 (*Shew Prasad Agarwalla*

and another v. Anil Ganguli and another), and Abdul Hamid and Others Vs. Durga Charan Das, . In 68 C.W.N. 786 one of the defendants-tenants died. His heirs having not been substituted it was held that the suit was not maintainable. In repeling the argument of the other side that the suit could proceed against the other defendants Bijoyesh Mukherji, J. referred to several decisions. Be that as it may the finding of the case reported in 68 C.W.N. 786 is against the appellant. In the case reported in Abdul Hamid and Others Vs. Durga Charan Das, the plaintiffs filed a suit for recovery of possession from a trespasser. The suit was dismissed. The plaintiffs preferred an appeal. Some appellants died during the pendency of the appeal. It was held that the suit being for recovery of possession from trespasser wherein the Court can give surviving co-owners decree for joint possession together with trespasser, leaving it to co-owners to work out their further rights by partition and as such the appeal does not abate as a whole. The facts of the case are completely different from the facts of the present case. In that case the plaintiffs' suit for recovery of possession from a trespasser was dismissed. The plaintiffs preferred an appeal and some of the plaintiffs died during the pendency of the appeal. It was held that the other appellants with the surviving appellants could proceed with the appeal as it is the settled position that some of the co-owners for the benefit of all can bring a suit against a trespasser for recovery of possession and there can be a joint decree along with the trespasser. In the present case as has already been stated the plaintiffs got a joint decree for recovery of possession against the trespasser. The appeal has been filed by the defendant and the defendant having not impleaded the legal heir of the respondent No. 2 the appeal has abated as against him and as such for the reason that in case of the success of the appeal there will be two inconsistent decrees the appeal must be held to have been abated as a whole. The objection raised by Mr. Bakshi regarding maintainability of the appeal is upheld. As regards merits of the case the trial court has found that the defendant was a licensee and the licence was revoked. The appellate court has however found that it was wrong on the part of the trial court to find that the defendant was a licensee. The appellate court finds that the defendant is a trespasser, that some amount paid by the defendant to the plaintiffs or their predecessor-in-interest was not rent but toll. There being concurrent findings of both the courts on the point that the defendant is not a tenant I find nothing to interfere.

In the result, the appeal fails and is dismissed on contest. The judgment and decree passed by the learned courts below are affirmed. There will be however no order as to costs.