

(1978) 03 OHC CK 0016
In the Orissa High Court
Case No : Second Appeal No. 281 of 1975

Fakirmohan Rana and Others

APPELLANT

Vs

Sri Basanti Debi Thakurani and Others

RESPONDENT

Date of Decision : 13-03-1978

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 11, Order 22 Rule 4

Citation : AIR 1978 Ori 224 : (1978) 45 CLT 581

Hon'ble Judges : S. Acharya, J

Bench : Single Bench

Advocate : D.S. Nanda and B.R. Rao, for the Appellant; G. Rath, R.K. Rath, N.C. Panigrahi and M.L. Jain, for the Respondent

Final Decision : Dismissed

Judgement

S. Acharya, J.—The plaintiffs have preferred this appeal against a reversing decision of the court below. The plaintiffs filed the suit for declaration, of their title to the suit lands, confirmation or in the alternative recovery of possession of the same from defendants Nos. 2 to 7 and for permanent injunction against them and in the alternative for refund of the consideration money paid to defendant No. 1 while purchasing the suit lands from him.

2. In view of the limited question on which this appeal is going to be disposed of it is not necessary to state in detail the respective cases put forward by the parties in claiming the suit lands for themselves. Suffice it to say that the plaintiffs allege that plaintiff No. 1 and his brother purchased the suit property from defendant No. 1 who had purchased the same in court auction sale. The plaintiffs were in possession of the suit property, but in 1969 Ganeswar Das, the marfatdar of defendant No. 2, and defendants Nos. 3 to 6 created disturbance in their possession. Hence the suit.

3. Ganeswar Das, who has been described in the plaint as the marfatdar of the deity defendant No. 2, and the defendants 3 to 6 filed a joint written statement.

Their case is that defendant No. 7 acquired occupancy right over the suit lands by virtue of the Amalnama granted to him by defendant No. 1 in 1941-42, and he, while in possession of the same, sold the suit lands to defendant No. 2. Since that time all these defendants are in possession of the suit lands on payment of rent. The plaintiffs do not have title or possession over the same. Defendant No. 1 was set ex parte. Defendant No. 7 supported the case of defendants 2 to 6.

4. The trial court decreed the suit on contest against defendants 2 to 7 and ex parte against defendant No. 1 with costs. It found that the plaintiffs had right, title and interest over the suit lands and that they would recover possession of the same through court if the suit lands were not vacated by defendants 2 to 7 within a month of the decision of that court.

5. Defendants Nos. 2 to 6 only appealed against the said decision of the trial court. Defendant No. 7 was impleaded as a respondent, and on his death during the pendency of the appeal his legal representatives were substituted as respondents 7 (a) to 7 (f).

6. The court below, as it appears from the impugned judgment, finds that the plaintiffs could not establish their title to the suit property; they were never in possession of the same; defendants 2 to 6 had purchased the same from defendant No. 1; and that they all are in possession of the same.

7. After the filing of this second appeal by the plaintiffs, defendant No. 3, respondent No. 2 in this Court, admittedly died. By the peremptory order dated 27-7-76 this Court directed the appellants to take steps for the substitution of the legal representatives of the said deceased within ten days thereof. As no step was taken in that direction, the office, as per the peremptory order dated 27-7-76, recorded the consequential order of dismissal of this appeal on 7-8-76, which in effect means dismissal of the appeal so far as it relates to defendant No. 3. Even thereafter also no step was taken for recalling that order. Only on 6-3-78 in course of the hearing of this appeal a petition was filed on behalf of the appellants, and I shall deal with that petition later in this judgment.

Mr. Nanda, the learned counsel for the appellants, states that he filed a memo for expunging the name of defendant No. 3 from record after the appeal had been dismissed in pursuance of the order dated 27-7-76. There is nothing on record to show that the said memo was ever pressed by anybody on behalf of the appellants. Moreover, as the order for the dismissal of the appeal had already been passed as per the order dated 27-7-76, that memo was of no avail or effect.

8. Mr. Panigrahi, the learned counsel for the respondents, at the outset contends that as the appellants have not taken steps to bring the legal representatives of deceased defendant No. 3 on record of this appeal and the decree of the court is a joint decree in favour of defendants Nos. 2 to 6, this appeal has abated in its entirety.

The court below in the impugned judgment has arrived at the finding that

defendants 2 to 6 are in possession of the suit lands and that the plaintiffs have not been able to prove their possession over the same. In the operative portion of the order it has been specifically ordered that the plaintiffs suit is dismissed against defendants 2 to 6 and respondents 7 (a) to 7 (f). Thus it is quite evident that the decree of the court below, so far as it relates to defendants 2 to 6 and respondents 7 (a) to 7 (f) is a joint decree. As the court below held that the suit property was in the possession of defendants 2 to 6 and the plaintiffs were not in the possession of the same, that finding cannot be interfered with in any manner so far as it relates to the legal representatives of deceased defendant No. 3 as the appeal stands dismissed as against defendant No. 3 and his legal representatives are not on record. In this connection it is worthwhile quoting the law laid down on this point in the decision reported in *The State of Punjab Vs. Nathu Ram*, . In para 6 thereof it has been held (at p. 90):

"(6). The question whether a Court can deal with such matters or not will depend on the facts of each case and therefore no exhaustive statement can be made about the circumstances when this is possible or is not possible.

It may, however, be stated that ordinarily the considerations which weigh with the Court in deciding upon the question are whether the appeal between the appellants and the respondents other than the deceased can be said to be properly constituted or can be said to have all the necessary parties for the decision of the controversy before the Court. The test to determine this has been described in diverse forms. Courts will not proceed with an appeal (a) when the success of the appeal may lead to the Court's coming to a decision which will be in conflict with the decision between the appellant and the deceased respondent and therefore which would lead to the Court's passing a decree which will be contradictory to the decree which had become final with respect to the same subject matter between the appellant and the deceased respondent; (b) when the appellant could not have brought the action for the necessary relief against those respondents alone who are still before the Court and (c) when, the decree against the surviving respondents, if the appeal succeeds, be ineffective, that is to say, it could not be successfully executed.

The observations in para 8 should also be quoted with benefit.

8. The difficulty arises always when there is a joint decree. Here again, the consensus of opinion is that if the decree is joint and indivisible, the appeal, against the other respondents also will not be proceeded with and will have to be dismissed as a result of the abatement of the appeal against the deceased respondent. Different views exist in the case of a joint decree in favour of respondents whose rights in the subject-matter of the decree are specified. One view is that in such cases the abatement of the appeal against the deceased respondent will have the result of making the decree affecting his specific interest to be final and that the decree against the other respondents can be suitably dealt with by the appellate Court. We do not consider this view correct. The specification of shares or of interest of the deceased respondent does not

affect the nature of the decree and the capacity of the joint decree holders to execute the entire decree or to resist the attempt of the other party to interfere with the joint right decreed in his favour. The abatement of an appeal means not only that the decree between the appellant and the deceased respondent has become final, but also, as a necessary corollary, that the appellate Court cannot, in any way, modify that decree directly or indirectly. The reason is plain. It is that in the absence of the legal representatives of the deceased respondent, the appellate Court cannot determine anything between the appellant and the legal representatives which may affect the rights of the legal representatives under the decree. It is immaterial that the modification which the Court will do is one to which exception can or cannot be taken."

9. The present appeal having been dismissed against defendant No. 3, the decree of the court below has become final so far as it relates to him. Therefore, the decision of the court below, that the plaintiffs have no title to the suit property; they were never in possession of the same and that defendants 2 to 6 were in possession of the same, will hold good in favour of the legal representatives of that defendant and that decision cannot be interfered with in this appeal as the legal representatives are not on record. So these legal representatives shall continue in possession of the suit lands even if this appeal is allowed and delivery of possession is decreed in favour of the plaintiffs. Moreover, if this appeal is heard and allowed in favour of the plaintiffs that will bring into existence a decree which will be contradictory to the decree which has become final with respect to the same subject-matter between the appellants and the deceased respondent No. 3. Further, the order of the court below dismissing the suit in respect of defendants 2 to 6 and respondents 7 (a) to 7 (f) cannot be altered or interfered with so far as it relates to the legal representatives of defendant No. 3. So, success of this appeal will bring into existence two conflicting decrees and will not enable the executing court to successfully execute the decree of this Court in favour of the plaintiffs. That being so, on the dismissal of this appeal against defendant No. 3 and its abatement against his legal representatives, this appeal abates in its entirety and has to be dismissed on that score.

10. It is urged by Mr. Nanda, the learned counsel for the appellants, that the suit so far as it relates to the suit property is mainly against the defendant No. 2, the deity, and Ganeswar Das and defendants 3 to 6 have been added in the plaint only as the marfatdars of the deity. So, on the death of defendant No. 3, one of the marfatdar of the deity, this appeal would not abate as any decision in this appeal in respect of the suit property would bind the deity and consequentially all its marfatdars, and so would not give rise to circumstances necessitating abatement of the appeal. I do not find any merit in the above contention.

In the plaint, only Ganeswar Das has been described as the marfatdar--shebait of the deity--defendant No. 2. Defendants 3 to 6 are not shown as the marfatdars of the said deity. In para 3 of the plaint it is stated that defendants 2

to 7 forcibly entered into the suit lands on 4-9-69 and since that time they have been creating disturbance in the plaintiffs' peaceful possession over the suit lands. Therefore, the plaintiffs' allegations against the defendants 3 to 6 are directed personally against them and not in their capacity as the marfatdars of the deity.

In para 6 of the joint written statement filed by defendants 2 to 6 they have asserted that the suit property was sold on 30-10-50 in the name of defendant No. 2 under the marfat of Ganeswar Das and defendants 3 to 6, and since that time these defendants are in possession of the same. The court below has found that the plaintiffs have no right, title or interest in the suit property; they were never in possession of the same at any time; and that these defendants have been in possession of the same since a long time. The plaintiffs' suit, so far as it relates to defendants 2 to 7, is for declaration of the plaintiffs' title in the suit property, for confirmation or in the alternative for recovery of possession of the same from these defendants and for permanently injunctioning them from any way dealing with the suit property. So the prayers in the suit, so far as they relate to the above-mentioned reliefs, are all directed against all these defendants. The court below has found that defendants 2 to 6 are in possession of the suit lands. So that part of the finding of the court below enures personally in favour of these defendants, and it is not held that these defendants, are possessing the suit property on behalf of the deity or in their capacity as its marfatdars. Moreover, the finding of the court below that the plaintiffs have no title to the suit property holds good in favour of each of these defendants, and on the death of defendant No. 3 during the pendency of this appeal that finding cannot be altered so far as the legal representatives of that defendant are concerned.

In the decision reported in Babu Sukhram Singh Vs. Ram Dular Singh and Others, it has been held that where a joint claim against several defendants is made in a suit, and during the pendency - of the appeal by the plaintiff some of the defendants the and no separate claim is made against any of the defendants in appeal the failure of the plaintiff to bring on record their legal representatives results in abatement of the appeal in toto.

The decision ILR (1970) Cut 1109 : AIR 1971 Ori 15 (Guru Charan Jena v. Satyanarayan Jew Thakur) cited by Mr. Nanda is entirely on different facts, and the points decided in that decision do not directly apply to the point at issue in this appeal.

On the above considerations this appeal abates in its entirety and is dismissed with costs.

11. Both the courts below have decreed the plaintiffs' suit with costs so far as it relates to the relief claimed against Bhuyan Abdul Mahatab Khan, defendant No. 1 and respondent No. 6 in this appeal. Defendant No. 1 had not contested the suit in the trial court and was set ex parte there. He did not "prefer any appeal against the decision of the trial court and has not preferred any appeal in this

Court against the decision of the first appellate court against him. That being so, the plaintiffs are entitled to realise Rs. 240/- only from defendant No. 1 Bhuyan Abdul Mahatab Khan, as decreed by the courts below.

12. While this appeal was being heard on 6-3-78, a petition supported by the affidavit of an Advocate's Clerk was filed in this Court on that date. By this petition it is prayed that the order dated 7-8-76 dismissing the appeal be declared null and void, or the said order be recalled and the name of deceased defendant No. 3 be expunged from the record of this appeal.

The order dismissing the appeal was recorded for non-compliance of the peremptory order passed by this Court on 27-7-76. Apart from the inordinate delay in filing this petition, there are several other reasons on which this petition has to be dismissed. No move was made for recalling the peremptory order passed on 27-7-76, or for extension of time granted by the said order. No step even was taken on behalf of the appellants for recalling or modifying the said order till the filing of the aforesaid petition on 6-3-78. No efforts were made at any time to substitute the legal representatives of deceased defendant No. 3 or to show that he died without leaving behind any legal representatives. Even if the order dated 7-8-76 is recalled at this stage and the name of deceased defendant No. 3 is expunged from the memorandum of appeal as prayed for by the petition dated 6-3-78, this appeal, in the facts and circumstances of the case stated in the preceding paragraphs, cannot be heard on merits without proof of the facts that defendant No. 3 died without leaving behind him any legal heirs of that all the necessary parties for the decision of all questions arising in this Court are already on record and that an effective decree on the merits of the case can be passed by this Court. There is nothing in the said petition to establish the aforesaid facts. On the above considerations, the said petition is dismissed.