

(2011) 01 PAT CK 0034
In the Patna High Court
Case No : Misc. Appeal No. 469 of 2001

Ganga Darshan Ram @ Ganga Darshan Dusadh and Others	APPELLANT
Vs	
Sudhakar Rai and Others	RESPONDENT

Date of Decision : 24-01-2011

Acts Referred:

Citation : (2011) 01 PAT CK 0034

Final Decision : Dismissed

Judgement

Gopal Prasad, J.—This miscellaneous appeal is directed against the order dated 24.07.2001 passed by First Additional District Judge, Buxar in Title Appeal No. 210 of 1967 by which the appeal has been dismissed holding that the appeal has abated as a whole due to non substitution of the legal heirs of some of the Respondents.

2. From perusal of the records it appears that a Title Suit No. 64 of 1963 was filed by the Plaintiffs for ejectment and recovery of possession of the suit land on the ground of default for non payment of arrears of rent.

3. The case of the Plaintiff is that a house standing on the plot No. 3996 area 7 decimal was the property of one Raghunandan Ram. The said Raghunandan Ram let out the property on a rent @ Rs. 2/- per month, the suit property to Defendant No. 1 as Karta of the family and the Defendant Nos. 2 and 3 were the full brothers of Defendant No. 1, all sons of Koleswar Prasad. Later, the suit property was sold by a registered sale deed dated 09.12.1958 to the Plaintiff. The Plaintiff demanded the rent which was denied. It has further been pleaded that the Defendant adorned and accepted, the Plaintiff as landlord but did not pay the rent. Notice was sent and thereafter the suit was filed. The notice served on Defendant Nos. 1, 2 and 3. However, the Defendant No. 3 appeared and filed a written statement. The Defendant No. 3 in his written statement denied the relationship of landlord and tenant and pleaded his independent title of himself and his brothers on the basis of a settlement from Dumraon Raj and asserted that the house of Raghunandan Ram decayed and it become a Parti land and

subsequently the land become Gairmajarua Malikana. It is further claimed that 2 Khata 5 Dhur of land of said plot was orally settled to Defendant No. 1 to 3 and in the suit Plot Krit Dushad son of Dhodha Dushad, Khari Dhushad son of Bharat Dhushad, Ram Prit Dhushad son of Dhodha Dushad, Duanni Dhushad and Soma Dhushad both sons of Dharath Dhushad are also residing in Plot No. 3996 by constructing their own houses separately and the Plaintiff has knowingly not made them as party and so the case suffered from misjoinder and nonjoinder of parties and liable to be dismissed. The Defendant No. 1 was never the Karta and the three Defendants are living separately since long and it is denied that the house was ever rented by Dhaneshwar Ram and Raghunandan Ram and Raghunandan Ram had no transferable right.

4. On the written statement filed by Defendant No. 3, the Plaintiff filed amendment petition to add 5 persons mentioned in the written statement to be added as party. By the order of the Court they were ordered to be added as Defendant No. 4 Krit son of Dhodha, Defendant No. 5 Ram Prit son of Dhodha, Defendant No. 6 Batkhari son of Dharath, Defendant No. 7 Duanni Dhushad son of Dharath Dhushad and Defendant No. 8 Sobha Dhushad son of Dharath Dhushad.

5. After the adding Defendant No. 4 to 8 as party, they were noticed and on notice Defendant No. 7 and 8 appeared and filed the written statement to contest the suit and the Defendant No. 7 and 8 in the written statement asserted that the house has not been constructed by Dhaneshwar Ram and Raghunandan Ram over the suit land and they denied that the Defendant No. 1 was the Karta and he is stranger to the family. The houses of these Defendants are in the South and the houses of the original Defendant in the North and the Defendants are living in the house since last 30 years and Raghunandan Ram has no right to sell the land and the sale deed dated 09.12.1958 was forged and fabricated and Plaintiff never demand any rent and asserted their adverse possession over the suit property to the tune of three and half decimals.

6. The suit was decreed in favour of the Plaintiff. However, the title appeal was preferred by Defendant No. 3 against the judgment and decree in T.S. No. 64 of 1963 bearing Title Appeal No. 210 of 1967 and the said Title Appeal No. 210 of 1967 was dismissed on 27.04.1978 on merits affirming the decree in the suit. However, a second appeal was preferred against the judgment and decree in T. A. No. 210 of 1967 bearing S.A. No. 231 of 1978. However, the second appeal succeeded, judgment and decree passed in T.A. No. 210 of 1967 set aside and was remanded for re-consideration before the First Appellate Court in T.A. No. 210 of 1967 and after the remand the notices were issued in the year 2000 and consequently upon notice to the parties it was reported that Respondent No. 1 B, 2 E, Respondent Nos. 3, 5, 6 and 8 to 12 were dead and then it was intimated to the learned Counsel for the Appellant and consequently the contesting Plaintiff-Respondent filed a petition on 16.07.2001 seeking abatement of the appeal due to non substitution of the heirs of the deceased.

7. A rejoinder was filed stating inter alia that the Respondent No. 3 Ram Lakhan Dhushad who was Defendant No. 1 did not appear in the suit nor filed written statement neither contested the suit and hence his name be expunged and other Respondents were pro forma Defendants as in petition for substituting Defendant No. 4 to 8 no relief sought against them and hence Appellant be exempted from making any substitution of the heirs of the deceased Respondent.

8. After considering the respective submission and perusal of the records the appellate court held that the appeal abated as a whole for non substitution of the heirs of Defendant No. 4 and onwards on the ground that the Appellant themselves had raised objection, about adding Defendants 4 to 8 as necessary party in possession of suit land, in their written statement and hence rejected their plea that Defendant No. 4 and onwards were pro forma Defendant.

9. Learned Counsel for the Appellants, however, contended that the Respondent No. 1 B was the widow of the original Plaintiff Harihar Rai and her sons and daughters are already on record as Respondent and hence the estate of the Respondent No. 1 E, 1 B is wholly represented and hence there is no question of abatement. Similarly the death of 2 E is the daughter of Haribansh Lal, the original Plaintiff No. 2. There are other brothers already on record and hence the estate is represented.

10. It has further been contended that Respondent No. 3 Ram Laxman Dhushad was the original Defendant No. 1 who is the full brother of Ganga Darshan Ram Defendant No. 3-Appellant. Respondent No. 4 Defendant No. 2, Respondent No. 4 Medha Dhushad and Defendant No. 1 Respondent No. 3 neither appeared in the suit nor filed a written statement nor even deposed or contested. The Appellant sought exemption from substituting their legal heirs under Order XXII Rule 4. On the ground that they neither appeared nor contested nor filed written statement. The assertion of Defendant No. 3 the Appellant in his written statement that the said land was taken in settlement by their father and since the two brothers of the deceased Respondent No. 3 are already on record, the State is represented.

11. However, with regard to the Respondent No. 5 and onwards it has been asserted that they have been added party but no prayer was made in the substitution petition seeking a relief against them and there is assertion of their separate house in plot No. 3996 and they have pleaded their adverse possession asserting their house as Kaccha Khapparpos and asserting their adverse possession over the part of the suit land and further it has been asserted that the Respondent No. 6, 8 and 9 are the sons of Shobha Dhushad who have been substituted along with the other brothers and allegation that Shobha Dhushad and others have constructed separate house. However, the Respondent No. 7 is Indradev Dhushad, full brother of Respondent No. 6, 8 and 9 and hence the Estate of 6, 8, 9 is represented by their full brother Respondent No. 7, hence there is no question of abatement and however, Respondent No. 10, 11 and 12 who were Defendant No. 4, 5 and 6 but they never appeared nor contested the

suit by filing the written statement nor appeared in the appeal and so Order XXII Rule 4 is applicable and further the house of these people are separate from the house of Defendant No. 3 in plot No. 3996 and hence under the facts and circumstance it is contended that the suit may not abate with regard to the deceased 1B, 2E and Respondent No. 3. However, for the death of Respondent No. 5 and onwards their claim over part of land claimed by them can well be specified and if their interest is specified then the suit can well be abated to the extent of their interest and not as a whole. It has been stated that Respondent No. 5 and onwards are pro forma Defendant and non substitution of the heirs of pro forma Defendant, the appeal does not abate attract abatement.

12. Learned Counsel for the Appellant has further submitted that permission may be granted to substitute the legal heir of the deceased Respondent No. 5 as to give substantial justice. The procedure may not come in way as it is well known by reasons of the various decision of the Hon"ble Supreme Court and the Hon"ble High Court normally set aside the abatement once it is found that the Plaintiff-Appellant has good cause for non filing of the application within the specified period.

13. Learned Counsel for the Respondent, however, contended that on the assertion of the original Defendant No. 3 in their written statement that the others are also having possession over the suit land by constructing their house over the said plot and there is specific averment about their possession over the suit land but it is not possible to specify the extent of the interest of the Appellant and deceased Defendant Respondent and hence the interest of the deceased Respondent are neither separable nor specifically carved out. It has been further contended that Defendant No. 3 who is Appellant asserted in his written statement that other Defendants are in possession and on which the Plaintiff added the Defendant No. 4 and onwards who are Respondent No. 5 and onwards and itself seek relief for as there is prayer for eviction or ejection of the Defendant from the suit land and hence the Defendants are not the pro forma Defendant and further the Defendant No. 7 and 8 appeared and filed their written statement asserting their right, title and interest over the suit property and even asserted adverse possession and contested the suit.

14. However, with regard to the death of Respondent No. 8 the heirs of Respondent No. 8 were substituted. However, Respondent No. 7 died but the heirs of Respondent No. 7 have not been substituted and hence the suit abates against Respondent No. 7. However, the abatement of appeal against deceased there is no question of abatement against them but the only question is whether the appeal can proceed against them as the success of appeal may lead to the passing of a decree which will be contrary to the decree which has become final with respect to the same subject matter against deceased Respondent and hence in the circumstances if the appeal succeeds it could not be successfully executed and has placed reliance upon decision reported in The State of Punjab Vs. Nathu Ram, as well as decision reported in Ramagya Prasad Gupta and Others Vs. Shri

Murli Prasad and Others, .

15. It has further been contended that even after the report of the death of the deceased Respondent in the appeal the Appellant did not take any step for substitution nor filed any petition either for condoning the delay in filing the substitution petition nor filed any substitution petition nor filed any petition for setting aside the abatement and hence there is no question for setting aside of abatement.

16. Hence, on the respective submissions of the parties the question for consideration are:

(i) Whether the Estate of the deceased has been represented (ii) Whether the interest of the deceased Respondent No. 5 and onwards can well be specified and separated and in consequence (iii) whether the court shall proceed with an appeal when the success of the appeal may lead to the courts coming to a decision which is in conflict with the deceased Respondent i.e. there is a possibility of conflicting decree which could not be successfully executed?

17. However, taking into consideration the respective submissions the facts remain in narrow compass regarding the death of Respondent No. 1B, 2E, 3, 6 and 8 to 12. However, Respondent No. 1B is the wife of original Plaintiff Harihar Rai and the sons and daughters of Respondent No. 1B are already on record. With regard to the Respondent No. 2E the brother and sister of 2E are already on record and Respondent No. 2 is the Plaintiff No. 2. With regard to the Respondent No. 3 who was Defendant No. 1. No written statement was filed by the Defendant No. 1 Respondent No. 3 and the property claimed to have been settled to the father and the Appellant Defendant No. 3 filed the written statement and contested the suit and the Defendant No. 2 who is Respondent No. 4 already on record to represent the Defendant No. 1 Respondent No. 3. However, Respondent No. 6, 8 and 9 have died but Respondent No. 7 is the full brother of Respondent Nos. 6, 8 and 9. However, Respondent No. 5 is Defendant No. 7 who was added as Defendant 4, 5, 6 and 8 and Defendant No. 8 died and the heirs of 8 were substituted. However, the heirs of Respondent No. 5 Defendant No. 7 were not substituted hence suit abate against Respondent No. 5 Defendant No. 7 under Order XXII Rule 3 of the C.P.C and since Respondent No. 5 Defendant No. 7 file written statement and contest the suit so Order XXII, Rule 4 is not applicable and Order XXII Rule 4 come to the rescue of Appellant if Defendant not filed written statement and fail to appear and contest the suit and further Order XLI Rule 4 is also not applicable as the Defendant No. 7 has been made party in appeal.

18. However, the legal representative has been defined in 2(11) of the CPC and the legal representative has been defined as person who in law represents the Estate of the deceased and includes any person who intermeddle with the Estate of the deceased and whether a party sue or is sued in representative character, the person on whom the estate devolve on the death.

19. However, on decision reported in *Sudama Devi and Others Vs. Jogendra Choudhary and Others*, the question raised whether the legal guardian of a minor in possession of his property who is himself the party to the suit along with such manner would on the latter's death become his legal representative as an intermeddler with the estate u/s 2(11) of the CPC and it was held that legal guardian of a minor in possession of his property who is himself a party to the suit along with the said minor would on the latter's death become his legal representative as a intermeddler and hence decision relied upon though applicable regarding death of Respondent No. IB, IE, 3, 6, 8 to 12 but not applicable against Respondent No. 7 under the fact and circumstance of the case.

20. In decision reported 1991 (2) PLJR 479 (*Baikunth Prasad Verma v. Lachmi Paper House and Ors.*) and decision reported in *Chunni Singh Vs. Chanda @ Chandu Oraon and Others* it was observed that the brother of Appellant No. 2 in that case was already on record and had been intermeddling with the property and he could have been legal representative of the Appellant also not applicable with respect of death and Defendant No. 7 Respondent No. 5 in the present fact and circumstance of the case. However, it was observed that the substitution petition requires to be leniently construed under the facts and circumstances of that case when there was application for substitution was filed with a prayer for setting aside abatement in view of the provision contained in Order XXII Rule 9 of the C.P.C and set aside the impugned order send down for consideration afresh to the facts and circumstance of the case. However, under the fact and circumstance of the case at hand no substitution petition filed nor prayer for condonation of delay nor a prayer for setting aside abatement rather plea taken that Defendant No. 5 and onwards are pro forma Defendant and Appellant be exempted from substituting the legal heirs.

21. However, taking into consideration the fact that the suit was filed by the Plaintiff by ejectment and recovery of possession on the ground of default for non payment of the arrears of rent with regard to the house standing on plot No. 3996 area 7 decimals. However, the notice was issued to Defendant No. 1, 2 and 3 but the Defendant No. 3 appeared and filed written statement denying the relationship of landlord and tenant pleading. His independent title on the basis of oral settlement of Dumrao Raj with regard to the 2 Kattha and 5 Dhur of land asserting the land and further asserted that Krit Dhushad, Khari Dhushad, Ram Prit Dhushad, Duanni Dhushad and Sobha Dhushad also residing in plot No. 3996 by constructing their house separately and the Plaintiff has knowingly not made them party. On the said pleading of Defendant Appellant the Plaintiff added them as Defendant in the suit as Defendant No. 4 to 8 and even Defendant No. 7 and 8 appeared and filed their written statement and decree was filed and on contest by Defendant No. 7 and 8 and the Defendant No. 3 the suit decreed. However, Defendant No. 3 preferred an appeal and in the appeal this Defendant No. 7 was made the Respondent No. 5 in appeal and the Plaintiff No. 1 and Plaintiff No. 2 in the suit were Respondent No. 1 and Respondent No. 2 in appeal and Defendant No. 8 in suit was Respondent No. 6 in the appeal. However, on the death of

Defendant No. 8 his heirs were substituted but on the death of Respondent No. 5 the heirs of Respondent No. 5 was not substituted and a petition filed for abatement. However, the fact regarding the death of Respondent No. 5 was brought to the notice of the Appellant. The Appellant did not take any step either for substitution substituting the heirs of Respondent No. 5 which was given in the year 2000 itself rather took a plea that the name of the Appellant be expunged as they are pro forma parties and the Appellant be exempted from making any substitution of the heir of the deceased Respondent and hence neither filed a petition for substitution nor filed petition for condoning the delay in filing a limitation petition neither shown any good cause for not filing the limitation petition in time whatsoever nor pray for setting aside abatement against those Respondents and hence in this background two fold submissions have been made as whether the abatement of appeal against the Respondent No. 5 or whether the appeal can proceed? However, the point raised is not res integra and the learned Counsel for the Appellant has relied upon decision reported in *The State of Punjab Vs. Nathu Ram*, where the principle has been laid regarding the effect of abatement of appeal as against the one Respondent.

22. However, under the facts and circumstances of the case reported in *The State of Punjab Vs. Nathu Ram*, was that the land jointly owned by the two brothers and the said land was acquired and on their refusal to accept the compensation offered by the Collector. The State Government referred the matter for inquiry to an Arbitrator under Rule 10 of the Punjab Land Acquisition Rules. The Arbitrator passed a joint award granting a higher compensation as well as sum of account of income tax. The State Government preferred an appeal and during the period of the appeal one of the brothers L died but his legal representative was not brought on record. The appeal abated against him and the question for consideration whether the appeal also abated against other brother N and it was held that the appeal against N alone could not proceed and to get rid of a joint decree, it was essential for the Appellant State to implead both the joint decree-holder and in the absence of one of the two brother appeal was not properly constituted and further held that order XXII Rule 4 of the C.P.C does not provide for the abatement of appeal against the co-Respondents of the deceased Respondent and there is no question of abatement of the appeal against them. The only question is whether the appeal can proceed against them and further held that the provision of Order I Rule 9 of the C.P.C also show that if the court can deal with the matter in controversy so far as regards the right and interest of the Appellant and the Respondents other than the deceased Respondent, it has to proceed with the appeal and decide it. It is only when it is not possible for the court to deal with that it will have to proceed further with the appeal and therefore dismissed it and the test to determine has been described:

(a) When the success of the appeal may lead to the courts coming to a decision which it in conflict with the decision between the Appellant and the deceased Respondent and therefore would lead to the courts passing a decree which will be contradictory to the decree which has been come 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 Respondent if the appeal succeed be ineffective i.e. to say it could not be successfully executed.

24. In decision reported in Ramagya Prasad Gupta and Others Vs. Shri Murli Prasad and Others, , Ramagya Prasad Gupta and Others Vs. Shri Murli Prasad and Others, which affirm the decision reported in The State of Punjab Vs. Nathu Ram, and held that it is not correct that the appeal abate against other Respondent but under certain circumstance the appeal may not be proceeded with and is liable to be dismissed not because procedural defect but because it is part of the substantive law.

25. However, reverting back to the fact and circumstance of the case at hand the suit was filed against the original Defendant 1, 2 and 3 and after notice Defendant No. 3 came and contested and filed written statement asserting that there are other person also on the land specifically mentioned the name of five persons. Those five persons were added as party and out of them Defendant No. 7 and 8 appeared and filed his written statement asserting they are in possession of the part of the land with the house and contested and a joint decree was passed for eviction against both. Now the Defendant No. 3 preferred an appeal and Defendant No. 7 and 8 were made Respondent No. 5 and 6 who had been added as Defendant and who contested after filing the petition and the decree was passed against him by the trial court and the decree was passed jointly against the Defendant No. 3 who the Appellant and Defendant No. 7 and 8 who filed the written statement and contested the case and hence the decree passed was a joint decree against both of them.

26. Hence, applying the principles as enumerated in The State of Punjab Vs. Nathu Ram, and Ramagya Prasad Gupta and Others Vs. Shri Murli Prasad and Others, in the fact and circumstance of the present case, the appeal abates against the Respondent No. 7 as legal representative of Respondent No. 7 were not brought on record under the fact and circumstance of the case. It will be difficult to carve out share of Respondent No. 7 in the suit land in his absence as there is nothing in the pleading of the Defendant No. 3 and Defendant No. 7 and 8 as to what extent and in which side they are in specific possession over the land in suit and if the appeal abate against Respondent No. 7 and the appeal allowed against the Appellant who was Defendant No. 3 may lead to a situation that court passing a decree will be contradictory to the decree which has become final against the deceased Respondent with regard to the subject matter of suit and hence will create a situation of conflicting decree not to be successfully executed and hence in such a situation the appeal cannot proceed without the substitution of the legal heir of the Respondent No. 7.

27. However, it has been asserted that the Respondent No. 7 is a pro forma

Defendant as no relief has been sought against him while adding them as Defendant in the suit. However, from the perusal of the suit relief has been sought for eviction from the Defendants and when the Defendant No. 4 to 8 was added as Defendant. The prayer extent to them as they were Defendant and it was not required to further make a prayer for eviction against them and having regard to the fact that they have been added as Defendant and there was prayer in the suit for eviction of the Defendant then the prayer had equally extended over these newly added Defendant and it was not required to make a fresh payer against them.

28. However, having regard to the fact that the Petitioners were added as Defendant on the pleading of the original Defendant and these Defendant No. 7 who is Respondent No. 5 filed the written statement contested the suit and hence they cannot be said to be a pro forma Defendant and hence the decision relied upon 1993 SCC 285 (Hira Lal and Anr. v. Gajjan and Ors.) that the appeal does not abate for the non substitution of pro forma Defendant is not applicable to the fact and circumstance of this case.

29. It has further been submitted that the Petitioner may be permitted to add the legal heir of the Respondent No. 5 and a reliance has been placed upon decision reported in 1991 (2) PLJR479 (Baikunth Prasad Verma v. Lachmi Paper House and Ors.). However, in the facts and circumstances of the case the suit was filed for eviction on personal necessity. However, it appears that Defendant No. 3 died leaving behind his widow and two daughters and after eight months a petition was filed for passing an order of abatement on the ground of non-substitution of legal representative of deceased Defendant No. 3. The Plaintiff put a rejoinder petition praying to eject/reject the same and also to allow substitution of the heir of the deceased Defendant No. 3 alleging therein that the right to sue survives and further that if deemed necessary the substitution petition be allowed invoking Section 5 of the Limitation Act and under the facts and circumstances the trial court rejected the petition on one of the ground that though through a rejoinder petition a prayer for substitution cannot be allowed. However, the Hon'ble High Court on appeal that a rejoinder having contend all the necessary facts and ingredients invoking Section 5 of the Limitation Act as well as under Order XXII Rule 4 and 9 of the CPC The court was not correct in observing that there was no application filed on behalf of the Petitioner praying to set aside the abatement and allow the substitution of the legal representative after condoning the delay.

30. However, having regard to the facts and circumstances of the present case at hand the original suit was filed in 1963, the suit was decreed in 1967, the appeal preferred in 1967 and the said appeal was dismissed. However, the second appeal was preferred and in second appeal the decree set aside and the case remanded for re-consideration and thereafter the notice was issued in 2000 and consequently upon the notice it was reported about the death of the Respondents including Respondent No. 5 and consequently the contesting Plaintiff Respondent

filed a petition on 16.07.2001 seeking abatement of appeal and a rejoinder was filed stating inter alia to expunge the name of the Respondent as Respondent No. 3 who was Defendant No. 1 not appeared in the suit nor filed written statement neither contested the suit and hence his name be expunged and other Respondent were pro forma Defendant and hence the Appellant be exempted from making any substitution of the heirs of the deceased Respondent and did not file any substitution nor for condoning the delay and hence in the facts and circumstances since the litigation is going on since 1963 and the on the death of Respondent the Appellant neither preferred any petition or prayer for substituting their legal heir or for condoning the delay in appeal nor petition for setting aside abatement rather took a plea that the deceased Respondent 5 was a pro forma Defendant and he may be exempted from substituting the legal heir of Respondent No. 5 and though the law provides to be liberal in granting the substitution but having regard to the facts and circumstances and moreover the non substitution of the heir of Respondent No. 5 goes to the root whether the appeal can proceed against the rest of the Defendant and the provision of Order 1 Rule 9 of the C.P.C is applied. The question is whether the court can deal with the matter in controversy so far as regards the right and interest of the Appellant and the Respondent other than the deceased Respondent it has to proceed with the appeal and decide it and hence under the facts and circumstances as discussed above the appeal cannot proceed without adding the heirs of the deceased Respondent and hence in the absence of the Respondent No. 5 the appeal is not properly framed and the appeal cannot proceed in the absence of Respondent No. 7 and hence having regard to the fact that since there is no prayer, no petition rather to the contrary assertion that the Plaintiff be exempted from substituting heirs of the Respondent No. 5 and hence under the facts and circumstances since the appeal cannot proceed in the absence of Respondent No. 5 and hence the appeal is not maintainable abates as a whole and hence I do not find any merit in this appeal and hence the appeal is dismissed.