

(1972) 09 DEL CK 0002

In the Delhi High Court

Case No : Civil Miscellaneous Appeal No. 415 of 1972 and Regular First Appeal No. 135D of 1960

Jagjot Singh

APPELLANT

Vs

Hafiz Mohd. Said and Another

RESPONDENT

Date of Decision : 11-09-1972

Acts Referred:

Citation : (1973) ILR Delhi 656

Hon'ble Judges : T.V.R. Tatachari, J; R.N. Aggarwal, J

Bench : Division Bench

Advocate : B.G. Singh and C.L. Itorora, for the Appellant;

Judgement

R.N. Aggarwal, J.

(1) This order will dispose of an application C.M. 415/72 made by the plaintiff Hafiz Mohd. Said under Order 22, Rules 4 and 11 read with Section 151 CPC for an order that the Regular First Appeal No. 135-D of 1960 has abated and it be dismissed as not competent. The relevant facts for the decision of the application are: the plaintiff filed a suit against the defendants Jagjot Singh and 23 others for their ejection from the premises described as Municipal No. X/1337 known as "National Cloth Market" situate at Bazar Chiti Qabar, Ward No. X, Delhi. The suit was founded on the allegations that the plaintiff had by an agreement dated 8th June, 1951 leased out to defendants No. 1 and 2, 17 shops known as "National Cloth Market" at a rent of Rs. 300.00 per month for a period of three years. Defendants 1 and 2 were given permission to sublet part of the premises to other cloth merchants, that defendants no. 1 and 2 had sublet the premises to the tenants detailed in column 3 of Schedule A annexed to the plaint with the permission of the plaintiff, that defendants no. 1 and 2 later without the knowledge and consent of the plaintiff replaced the said sub-tenants by defendants 3-24. The plaintiff claimed eviction of the defendants on the grounds, namely, (a) that defendants 1 and 2 had committed breach of the terms of lease and had defaulted in paying the rent; (b) that defendants 1 and 2 had sublet the

premises to defendants 3 to 24 without any legal authority; (c) that the period of lease had expired on 31st May, 1954; and (d) that the demised premises are wholly in occupation of sub-tenants defendants 3 to 24. The plaintiff stated in para 19 of the plaint that defendants 3 to 24 are sub-tenants and, Therefore, he has made them party to the suit. The plaintiff further claimed a sum of Rs. 6200.00 as arrears of rent and Rs. 1700.00 on account of damage from defendants, 1 and 2.

(2) The suit was only contested by defendants 1 and 2. Defendants 1 and 2 denied their liability to eviction on the grounds pleaded. Defendants 1 and 2 pleaded that the sub-tenants were inducted with the express permission of the plaintiff and their possession of the demised premises as sub-tenants is lawful. The contesting defendants further pleaded that that plaintiff had stopped the sub-tenants from paying the rent to them and accordingly their liability to pay the rent to the plaintiff ceased altogether under the principles of suspension of rent.

(3) The trial Judge on the pleadings of the parties framed a number of issues. The trial Judge found:-

(A) that the subletting was with the permission of the plaintiff and the sub-tenants are lawful sub-tenants; and (b) that defendants 1 and 2 had defaulted in paying the rent.

(4) The trial Judge in view of his findings on the various issues decreed the suit of the plaintiff. The relevant portion of the decree reads as under:-

"the result of the suit is that I grant the plaintiff a decree for ejectment from the premises specified in the plaint against the defendants. The defendants 1 and 2 are tenants under the plaintiff and the remaining defendants are the sub-tenants under defendants 1 and 2. I further grant the plaintiff a decree for Rs. 6200.00 against defendants 1 and 2. The defendants 1 and 2 shall also pay costs of this suit to the plaintiff."

(5) Against the judgment and decree of the trial Judge, defendant No.2 Jagjit Singh has come in appeal to this court. Defendants No. 1 and 3 and 24 were made respondents in the appeal. Notices were issued to the respondents for 23rd November, 1971. On the notice issued to respondent No. 3 the report was that he had died about a year and a half ago. The appellant was directed to bring on record the legal representatives of respondent No. 3. The appellant on 3rd April, 1972 filed an application that respondents No. 3 to 24 are not necessary parties and the same be struck off the record. This application came up for consideration on 10th April, 1972 before Hon'ble Mr. Justice T.V.R. Tatachari and Mr. Justice Jagjit Singh. The Hon'ble Judges ordered on the said application that the names of respondents 3 to 24 be struck off the record. This led to the filing of the present application No. C.M. 415/72. The applicant respondent pleaded that a decree of ejectment was passed against respondents 3 to 24 and that they were necessary parties in the appeal, and that the effect of not bringing the legal representatives of respondent No.3 on record and the removal of the names

of respondents 3 to 24 from the record is that the appeal has abated and it is liable to be dismissed. The appellant has contested the application. The appellant pleaded that respondents 3 to 24 are not the parties interested in the appeal and the appeal in their absence is competent, Shri Hafiz Mohd. Said who argued the case in person, contended that there was a joint decree against defendants 1 to 24 and as a result of the removal of the names of respondents 3 to 24 from the record the decree against respondents 3 to 24 has become final and in case the appeal is allowed two inconsistent decrees will come into existence with the result that the entire appeal must be held to have abated. Shri Hafiz Mohd. Said further contended that respondents 3 to 24 were necessary parties to the appeal and in their absence the appeal cannot proceed. The plaintiff-respondent in support of his contention relied on *The State of Punjab Vs. Nathu Ram*, .

(6) Shri Gurcharan Singh, learned counsel for the appellant, on the other hand contended that the suit against defendants 1 and 2 and 3 to 24 did not proceed on a ground common to all the defendants and that defendants 3 to 24 were only proforma defendants and their presence was not necessary for the grant of the relief to the plaintiff and now to the appellant and the appeal in their absence is competent. The counsel further contended that there is one decree against defendants 1 to 24 and defendants 1 & 2 had a right independent of defendants 3 to 24 to get rid of the decree though thereby defendants 3 to 24 would also be freed from the decree. The counsel contended that provisions of Order 41 rule 4 CPC would be applicable and the appellant can be allowed the reliefs claimed in the appeal. Shri Gurcharan Singh in support of his contention placed reliance on the authorities *State of Punjab vs. Nathu Ram (supra)*, *Ratan Lal Shah Vs. Firm Lalmandas Chhadammalal and Another*, , and *Mahabir Prasad Vs. Jage Ram and Others*, -.

(7) We have given our careful thought to the arguments addressed at the Bar and in our view defendants 3 to 24 were not necessary parties to the appeal and the appeal in their absence is competent and has not abated. The case pleaded by the plaintiff was that defendants 1 & 2 are tenants under him and defendants 3 to 24 are sub-tenants under defendants 1 and 2. The plaintiff sought eviction of defendants 1 and 2 on the ground that they had failed to pay the rent and secondly, they had sub-let the premises to defendants 3 to 24 without any legal authority. It is clear from the averments in the plaint that defendants 3 to 24 were impleaded as defendants only in their capacity as sub-tenants. If the plea of the plaintiff that defendants 3 to 24 were sub-tenants without legal authority was accepted, defendants 1 & 2 would have become liable to be evicted from the demised premises along with defendants 3 to 24-irrespective of the fact whether defendants 3 to 24 were made parties to the suit or not in view of the provisions of Section 21 of the Rent Control Act, 1952. The same would have been the effect if the plea of the landlord with regard to the non-payment of rent was accepted. The touchstone or the criteria to determine whether the appeal abated as a whole would be whether defendant-respondents 3 to 24 were necessary parties to the appeal, or in other words whether the relief claimed by the appel

ant could not be granted by the court in the absence of respondents 3 to 24. The cause of action was that defendants 1 & 2 who are the tenants have not paid the rent and also sub-let the premises without legal authority. The relief claimed in the suit was the eviction of defendants 1 & 2 and of 3 to 24 who were sub-tenants under defendants 1 & 2. The action did not proceed on a ground common to defendants 1 & 2 and defendants 3 to 24. Defendants 3 to 24 were not a party necessary to the determination of the matters in issue between the plaintiff and defendants 1 to 2. The relief claimed in appeal is that the tenants defendants 1 & 2 are not liable to eviction on the ground found against them by the trial Judge. The appellant has also challenged in appeal the liability to pay Rs. 6200.00. The plaintiff had in the plaint confined his claim of Rs. 6200.00 only against defendants 1 and 2. We fail to see how defendants 3 to 24 are necessary parties to the appeal in determining the relief claimed in appeal. The decree passed in the suit against defendants 1 & 2 and 3 to 24 is not joint and indivisible. Defendants 3 to 24 were only proforma defendants in the suit and they cannot be called necessary parties to the suit or the appeal.

(8) Shri Hafiz Mohd. Said contended that u/s 20 of the Delhi & Ajmer Rent Control Act, 1952, on the determination of the tenancy of defendants 1 & 2, defendants 3 to 24 had become tenants under him and, Therefore, they were necessary parties to the suit Shri Hafiz Mohd. Said in making this contention has completely over looked his pleadings. His case, as mentioned in the earlier part of the judgment, is that defendants 3 to 24 were sub-tenants without any legal authority. Even if for the sake of argument it be taken that defendants 3 to 24 were tenants under the plaintiff then they were in possession of the demised premises independent of defendants 1 & 2 and there would be no jointness of interest between defendants 1 & 2 and defendants 3 to 24. This contention of Shri Hafiz Mohd Said has no merit.

(9) We shall next discuss the authorities referred to by Shri Hafiz Mohd. Said and the learned counsel for the appellant. In *State of Punjab vs. Natw Ram (supra)*,[^] the Supreme Court has explained the tests applicable In considering whether an appeal abates in its entirety when it has abated qua one of the respondents. The Head Note of the case reads:

"if the Court can deal with the matter in controversy so far as regards the rights and interests of the appellant and the respondents other than the deceased respondent it has to proceed with the appeal and decide it: otherwise it will have to refuse to proceed further with the appeal and Therefore dismiss it. Ordinarily, the consideration which will weigh with the court in deciding upon the question whether the entire appeal had abated or not will be whether the appeal between the appellants and the respondents other than the deceased respondent 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 and the tests to determine this have been described thus: (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 abatement of an appeal against the deceased respondent 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. When the decree in favor of the respondents is joint and indivisible, the appeal against the respondents other than the deceased respondent cannot be proceeded with if the appeal against the deceased respondent has abated."

(10) The principle of this judgment was affirmed in *Rameshwar Prasad and Others Vs. Shyam Beharilal Jagannath and Others*, and in *Kishan Singh vs. Nidhan Singh*, Civil Appeal No. 563 of 1962 dated 14th December, 1964 (Supreme Court), In our view, when the instant case is examined in the light of the tests laid down in *Nathu Ram's* case it is clear at that the appeal is competent and it can proceed against the respondents on record. We have in the earlier part of the judgment found that defendants 3 to 24 are not necessary parties to the appeal and the appellant can maintain the appeal and claim the relief against the respondents on the record in the absence of respondents 3 to 24. This would satisfy the test (b). In our view this case also satisfies the test (c). In the case of the success of the appeal the result would be that the suit against defendants 1 & 2 will stand dismissed and the decree for eviction would stand against defendants 3 to 24. Admittedly defendants 1 & 2 are tenants and defendants 3 to 24 are sub-tenants under defendants 1&2. If the suit against defendants 1 & 2 is dismissed the decree passed against defendants 3 to 24 becomes ineffective, that is to say, it cannot be successfully executed. Thus viewed, it is clear that even if it be held that the appeal against respondents 3 to 24 has abated. the appeal would be competent against the surviving respondents and the appellant can be allowed the reliefs claimed in the appeal.

(11) This conclusion further finds support from the decisions of Supreme Court reported as *Ratan Lal Shah Vs. Firm Lalmandas Chhadammalal and Another*, and *Mahabir Prasad Vs. Jage Ram and Others*, . In *Ratan Lal Shah's* case the plaintiffs obtained a joint decree against two persons Ratan Lal and Mohan Singh. Against the decree Ratan Lal alone appealed to the High Court of Allahabad. Mohan Singh was impleaded as a party respondent to the appeal. Notice of appeal sent to Mohan Singh was returned unserved and no steps were taken to serve him. The High Court was of the view that since there was a joint decree against Ratan Lal and Mohan Singh in a suit founded on a joint cause of action and the decree against Mohan Singh had become final the appellant on that account could not claim to be heard in his appeal. If he was heard and his claim

was upheld the High Court observed that there would be two conflicting decisions from the same cause of action. , appeal the Supreme Court set aside the judgment of the High Court and observed that even if Mohan Singh was not served the notice of appeal the appeal filed by Ratan Lal was maintainable in view of the provisions of Order 41 Rule 4 of the Code of Civil Procedure. The Supreme Court held:

"the trial court has passed a decree against Ratan Lal and Mohan Singh jointly and severally. Mohan Singh is liable for the full amount of the claim of the plaintiffs. If the appeal filed by Ratan. Lal succeeds the Court may reduce the liability of Mohan Singh but there may conceivably be no order by the Court operating to the. prejudice of Mohan Singh in the appeal."

(12) In Mahabir Prasad's case the facts were that Mahabir Prasad his mother Gunwanti Devi and his wife Saroj Devi had leased out certain property to Jage Ram and two others. Mahabir Prasad and others filed a suit in the court of the Subordinate Judge First Class Delhi for a decree for Rs. 61,750 being the amount of rent due by the defendants. The Subordinate Judge decreed the suit. Execution of the decree was resisted by the defendants on the plea inter alias that the decree was inexecutable because of the provisions of the Delhi Land Reforms Act 1954. The Subordinate Judge upheld the contention. and dismissed the application for execution. Mahabir Prasad alone appealed against that order and imp leaded Gunwanti Devi and Saroj Devi as party-respondents. Saroj Devi died in November 1962 and Mahabir Prasad applied that the name of Saroj Devi be struck off from the array of respondents. The High Court made an order granting the application subject to all just exceptions. The High Court dismissed the appeal holding that because the heirs and legal representatives of Saroj Devi were not brought on the record within the period of limitation prescribed by the Limitation Act the appeal abated in its entirety. Against that order Mahabir Prasad went in appeal to the Supreme Court. Their Lordships in the course of the judgment relied upon the decision of that court in Ratan Lal Shah's case and held:-

"no distinction in principle may be made between Ratan Lal Shah's case and the present case. Competence of the appellate court to pass a decree appropriate to the nature of the dispute in an appeal filed by one of several persons against whom a decree is made on a ground which is common to him and others is not lost merely because of the person who was jointly interested in the claim has been made a party-respondent and on his death his heirs have not been brought on the record. Power of the appellate court under Order 41 Rule 4 to vary or modify the decree of a Subordinate Court arises when one of the persons out of many against whom a decree or an order had been made on a ground which was common to him and others has appealed. That Power may be exercised when other persons who were parties to the proceeding before the subordinate court and against whom a decree proceeded on a ground which was common to the appellant and to those other persons are either not imp leaded as parties to the

appeal or are imp leded as respondents. The view taken by the High Court cannot Therefore be sustained."

(13) The authorities referred to above do support the contentions of the appellant, in determining the question of abatement we will have to look to the reliefs sought in the appeal. The eviction of defendants 1 & 2 has been ordered on the ground that they had defaulted in paying the rent. The court has further passed a decree for a sum of Rs. 6200.00 against defendants 1 & 2. In our view on the facts and circumstances of the instant case there can be no question of abatement of the appeal in its entirety and the appeal would be competent against the surviving respondents.

(14) Shri Hafiz Mohd. Said in support of his contention had further placed reliance on Ram Sarup Vs. Munshi and Others, and Sri Chand & others vs. Jagdish Pershad Kishan Chand & others Air 1966 Sc 1427. We have carefully perused the authorities cited above and in our view the facts of the cited cases are distinguishable and they have no application to the case in hand. In the case of Ram Sarup the fifth and sixth respondents in the case had sold to the appellants by a deed dated April 25, 1957, a piece of land for a consideration of Rs. 22,750.00. Mehar Singh and the second appellant had paid one-half of the sale consideration amounting to Rs. 11,375.00 while the other three appellants laid paid the other half. Respondents 1 to 4 instituted a suit against the appellants to which the vendors respondents 5 and 6 were also imp leded as co-defendants. The right of pre-emption was based on the plaintiffs being the owners collaterals of the vendors and heirs according to the rule of succession. The suit was decreed by the Subordinate Judge. The judgment in favor of respondents 1 to 4 was affirmed by the District Judge on appeal and on further appeal by the High Court. The vendees took an appeal to the Supreme Court. During the pendency of the appeal in the Supreme Court. Mehar Singh one of the vendees died and his legal representatives were not brought on the record. Before their Lordships of the Supreme Court it was contended by the counsel on behalf of the appellant that whatever might be the position as regards the share to which Mehar Singh was entitled in the property purchased, the interest of the deceased was distinct and separate from that of the others and that the abatement could be in any event only partial and would not affect the continuance of the appeal by the surviving appellants at least as regards their share in the property. Their Lordships on a perusal of the sale deed found that it is not a case of a sale of a separate item of property in favor of the deceased appellant but one of entire set of property to be enjoyed by two sets of vendees in equal shares. Their Lordships held:

"it is clear law that there can be no partial pre-emption because the pre-emption is substitution of the pre-emptor in place of the vendee and if the decree in favor of the pre-emptors in respect of the share of the deceased Mehar Singh has become final, it is manifest that there would be two conflicting decrees if the appeal should be allowed and a decree for pre-emption in so far as the

appellants 2 to 5 are concerned is interfered with. Where a decree is a joint one and a part of the decree has become final, by reason of abatement, the entire appeal must be held to be abated."

(15) It is clear that in the cited case the Judges had found that there was a joint decree against the vendees and in case of success of the appeal two inconsistent decrees will come into operation and on that ground found that the appeal had abated in toto. This position does not obtain in the instant case. We have found that there is no joint decree in favor of defendants 1 & 2 and Defendants 3 to 24. In Sri Chand's case the Hon'ble Judges had found that the ground on which the judgment of the High Court proceeded was common to all the sureties and one of the sureties having died and his legal representatives not having been brought on the record within the time prescribed, the appeal had abated in its entirety.

(16) The authorities referred to above are in our view of no assistance to the applicant-respondent.

(17) For the foregoing reasons we are of the view that respondents 3 to 24 are not necessary parties to the appeal and the appeal is competent" and has not abated for failure to bring on record the legal representatives of respondent no. 3 and on account of the order dated 10th April 1972 by which the respondents 3 to 24 were ordered to be struck off the record. In this view of the matter CM. 415/72 is rejected. There will be no order as to costs. We direct that the appeal be now listed for hearing on merits.