
(1971) 03 OHC CK 0020

In the Orissa High Court

Case No : Second Appeal No's. 523 and 524 of 1964

Jaladhar Kar

APPELLANT

Vs

Sadhu Charan Kar and Others

RESPONDENT

Date of Decision : 15-03-1971

Acts Referred:

Citation : (1971) 37 CLT 530

Hon'ble Judges : R.N. Misra, J;B.K. Patra, J

Bench : Division Bench

Advocate : Raghullath Das, for the Appellant; L.K. Dasgupta, B.B. Sahu and M. Hazra and A.G., for the Respondent

Final Decision : Allowed

Judgement

R.N. Misra, J.—The Plaintiff who instituted two separate suits being Title Suit Nos. 47 and 48 of 1953 in respect of two parcels of land is the Appellant against the reversing decision of the learned Additional Subordinate Judge of Cuttack. He had sued for declaration of title, confirmation and recovery of possession. He had also asked for the relief of recovery of damages.

2. Title Suit No. 47 of 1953 was in respect of 77 decimals of land while the connected suit was in respect of 23 decimals of land. The Plaintiff claimed that under an oral lease from the Manager of the Ex-estate of (sic) in March, 1941 he was accepted as the lessee in respect of these two items of property. The Defendants 1 and 2 were lessees for 25 decimals and 3 decimals respectively out of plot No. 96, the western portion whereof to the extent of 77 decimals was granted to the Plaintiff under the lease. These two Defendants with their associates disputed the Plaintiff's title in respect of the disputed property and on 6-9-1950 and 12-9-1950 they cut out and removed the standing jute crop raised by the Plaintiff. There was a criminal case by the Plaintiff which ended in acquittal. Thereafter the Plaintiff came with the present suits.

3. The Defendants 1 and 2 filed two separate written statements, the Defendants

3 to 6 filed another while the Defendants 7/ka and 7/kha filed one and the Defendants 8 and 9 together filed another. The Defendants claimed lease hold right in respect of the disputed property from the self same source. The Defendants 1 and 2, the Defendants 3 to 6 and the Defendants 7 to 9, who are respectively Kars, Malliks and Biswals by surnames claimed specific portions. It is not necessary to indicate the nature of the defence. Both the suits were tried together as the parties were common and common questions of fact and law were involved.

4. The learned Trial Judge decreed both the suits and declared the Plaintiff's title and an owed him to recover possession. He further directed partition of the properties, but negated the relief for damages.

5. Some of the Defendants appealed. The Plaintiff preferred cross-objections in regard to the refusal of damages. During the pendency of the appeals Kanduri Malik, the Appellant No. 4 in the lower appellate Court, died leaving behind legal representatives, but there was no substitution. The learned Subordinate Judge by a common judgment in the two appeals reversed the findings of the trial Court and dismissed the Plaintiff's suits. The cross-objections were also dismissed. The Plaintiff has preferred the two second appeals. Initially these appeals came before our learned brother Ray, J. who asked these two appeals to be heard by a Division Bench. That is how these appeals have now come before us for disposal.

6. Mr. Das for the Appellant contended that the Title appeals had abated as a whole and as such both the appeals should have been dismissed on account of total abatement. There is no dispute that Kanduri Malik, the Appellant No. 4, died during the pendency of the Title Appeal in the lower appellate Court leaving behind legal representatives and there was no substitution effected in accordance with law. Mr. Dasgupta for the Respondents concedes that there has been abatement, but according to him both the Title Appeals cannot be taken to have, entirely abated. He contends that since the Malik (the Defendants 3 to 6 in Title suit No. 48 of 1953 and the Defendants 4 to 7 in Title Suit No. 47 of 1953) had laid claim in respect of one common parcel of land the abatement should be confined to these Defendants and the claim laid by them. The title appeals could not have abated in regard to the rest of the property.

7. The abatement in this case is in the appellate Court and, therefore, its effect on the whole appeal would depend upon the nature of the decree passed by the trial Court. The learned Trial Judge considered the claim of the Plaintiff in regard to the entire property under the alleged oral lease as against the claim laid by the Defendants in regard to portions of the property. He came to hold that the claim of the Plaintiff that he had obtained an oral lease in March 1941 was true and he negated the defence plea of leases in their favour in regard to portions of the property. Thus the learned Trial Judge upheld the Plaintiff's claim under one oral lease which was sometime in March 1941 and found that the Plaintiff had been in possession of the property ever since then. Mr. Das claimed that as abatement took place subsequent to the decrees of the trial Court; and under

the decrees of that Court the Plaintiff's title had been upheld, with the abatement of the Title appeals as against Kanduri the abatement must be taken to have affected both the appeals in entirety and the abatement could not be confined to the Maliks alone. Mr. Dasgupta on the other hand wanted us to hold that as the property to which claim was laid by the Maliks was not the whole, but only a part of the disputed property, the effect of abatement must be limited with reference to the claim raised by the deceased Defendant and should not be allowed to affect the appeals in their entirety. In support of his plea Mr. Dasgupta relied upon various decisions including one of the Division Bench of this Court in *Atmakuri Rajeswari v. Joginnadha Patra* 34 C.L.T. 1131, to which my brother Patra, J. was a party. The facts of the case before the Division Bench of this Court were substantially different from the facts of the present case. The Plaintiffs had lost in the trial Court. Therefore, there was a decree of dismissal of the suit. The Plaintiffs were in appeal before this Court. Here on the other hand the suits were decreed by the trial Court and some of the Defendant were in appeal before the learned Subordinate Judge.

8. I have already indicated that if abatement takes place after the decree the effect of such abatement on the appeal has normally to be considered with reference to the decree which is being impugned. The decree of the trial Court in this case ran thus:

That the suit No. 47 of 1963 be decreed on contest in part against the contesting Defendants (Defendant 1 Malik and Biswal Defendants) with corresponding costs and exparte against the Defendant No. II and the minor Defendants and on contest against Defendants 2 and 3 without costs. The Plaintiff's title to plot No. 920 is hereby declared and he do recover possession of the same through Court....

In T.S. No. 48 of 1953 the suit be decreed on contest against the contesting Defendants 3 to 6 and 8 to in part with corresponding costs and exparte against the rest without costs. The Plaintiff's title to the extent of 0.77 decimals in plot No. 96 is hereby declared and he also recover possession of his western 77 decimals on partition....

Thus the learned trial Judge had accepted the Plaintiff's case in toto so far as the claim of title and possession was concerned. If Mr. Dasgupta's contention is correct that abatement would be limited only to Malik Defendants" then reversal of the decree of the trial Court would certainly lead to inconsistent conclusions. The Plaintiff based his title upon one single oral transaction. So far as the Maliks are concerned that transaction as affirmed in the trial Court's decree has to be upheld on account of abatement. But in regard to the remaining Defendants (Kara and Biswals) the Plaintiff's title under the oral lease has to be negatived. In effect there would be inconsistent findings. The same transaction under which the Plaintiff claimed would be upheld in part and would be discarded for the remainder.

9. In *Sri Chand v. Jagadish Parshad* AIR 1966 S.C. 1427, their Lordships of the Supreme Court were examining the effect of abatement in an appeal. The facts of that case were as follows: Messrs. Jagdish Parshad Kishan Chand instituted a title suit for recovery of possession of goods hypothecated to them by one Messrs. Mudgal Motor Ltd. The Plaintiff instituted another suit Money Suit No. 43 of 1952 for a decree for Rs. 42, 914-10-0 being the amount due at the foot of the hypothecation account and for sale of the goods in satisfaction of the amount due. The two suits were consolidated for trial. In the money suit the Plaintiff applied for appointment of a receiver and the Court directed Messrs. Mudgal Motors Ltd. to furnish security in the sum of Rs. 50, 000/-. Pursuant to that order five persons stood sureties for satisfaction of the decree. The five sureties mortgaged the properties specified in the schedule to the bond and jointly and severally undertook to satisfy the decree in case of default of the Defendant. In January 1955 Messrs. Mudgal Motors Ltd. were wound up. Title suit No. 265 of 1962 was thereafter withdrawn. The money suit was, however, decreed. The Plaintiff applied for execution against the sureties. The various objections of the sureties and judgment-debtors were overruled by the Subordinate Judge in the execution proceeding. The rejection of the objection was upheld in the Punjab High Court. A letters Patent Appeal in the same Court was also dismissed. Then the matter came before the Supreme Court. Basant Lal, one of the sureties Appellants died subsequent to the disposal of the appeal in the High Court, but there was no substitution before the Supreme Court, Shah J, as he then was, spoke thus:

Basant Lal died after the order of the High Court under appeal. He had preferred an appeal but since the legal representatives to his estate have not been brought on record, his appeal has abated. The orders of the High Court holding that the sureties are liable to satisfy the claim notwithstanding the objections raised by Basant Lal has become final. In the appeal filed by the Appellants 1 and 3 if this Court holds that the High Court was in error in deciding that the surety bond was not enforceable because it was not registered, or that the first Respondent has done some act which has discharged the sureties from liability under the bond there would unquestionably be two inconsistent orders one passed by the High Court holding that the surety bond was enforceable and the other, the view of this Court that it is not enforceable.

This Court has on more occasions than one considered whether in circumstances similar to these an appeal should stand abated in its entirety. In *The State of Punjab v. Nathu Ram* 1962 S.C.D. 219, this Court 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 interest 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 1(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 favour of the Respondent 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.

The principle of this judgment was affirmed in *Rameshwar Prasad and Ors. v. V. Shambehari Lal Jagannath and Anr.* 1963 S.C.D. 945 and later in an unreported judgment in *Kisnan Singh v. Nidhan Singh*. It may be pointed out that the three tests suggested by Raghubar Dayal, J. in *State of Punjab v. Nathu Ram* 1962 S.C.D. 219, are not cumulative tests. Even if one of them is satisfied the Court may having regard to all the circumstances, hold that the appeal has abated in its entirety.

The firstly test laid down in *Nathu Ram's* case is applicable to the present case. The decree of the trial Court as already indicated had declared the title of the Plaintiff in respect of the entire property on the basis of a single oral lease. If the plea of total abatement is rejected and the decree of the appellate Court is sustained, the net effect is that whereas in respect of the Maliks the decree of the trial Court would stand affirmed on the plea of abatement and the claim of the Plaintiff on the basis of the oral lease would be upheld, the claim of lease would stand invalidated in terms of the appellate decree in regard to the remainder of the property. Mr. Dasgupta contended with emphasis relying upon the words "with respect to the same subject matter". We are not impressed with his argument that in the facts of the present case, particularly in view of the Plaintiff's claim of title under a single oral lease; the dispute between the Plaintiff and the Defendants including the Maliks was not over the same subject matter. In fact the subject matter was whether the oral lease of 1941 as claimed

by the Plaintiff was true or the various leases under which the Defendants claim were true. Thus the subject matter was the oral lease of the Plaintiff. In the facts of the present case it must be held keeping in view the decree of the trial Court that inconsistent decrees would follow if the abatement in the lower appellate Court is confined to the Maliks Defendants alone. It must, therefore, follow that both the appeals had abated in their entirety and the learned Appellate Judge who in ignorance of the fact of death of one of the Appellants had reversed the decrees of the trial Court was not competent to do so. We would accordingly allow these Second Appeals, vacate the decrees of the lower appellate Court by holding that both the Title Appeals had abated in their entirety and, therefore, restore the decrees of the trial Court without proceeding to examine the merits of the dispute. We would however, not award costs in this Court in view of the fact that the success is on a technical point of abatement which had not been brought to the notice of the appellate Court and the effect whereof had not been taken into consideration by it.

B.K. Patra, J.

10. I agree.