

(1963) 09 OHC CK 0007

In the Orissa High Court

Case No : Second Appeal No. 94 of 1961

Kali Charan Sadangi and Another

APPELLANT

Vs

Agadhu Bhoi and Others

RESPONDENT

Date of Decision : 23-09-1963

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 22 Rule 4, Order 22 Rule 4(4)

Citation : AIR 1964 Ori 211 : (1963) 29 CLT 663

Hon'ble Judges : R.L. Narasimham, C.J;R.K. Das, J

Bench : Division Bench

Advocate : L.K. Dasgupta, G.N. Sengupta and Asok Mukherji, for the Appellant; S.C. Mohapatra and S.C. Jena, for the Respondent

Final Decision : Dismissed

Judgement

Narasimham, C.J.—This is a plaintiffs' appeal against the appellate judgment of the Subordinate Judge of Bolangir allowing in part an appeal by the defendants against the judgment and decree of the Munsif of Sonapur in a redemption suit. The plaintiffs' ancestor was said to have, created an usufructuary mortgage of the disputed properties in favour of defendant No. 1. Defendants 2 to 13 are members of the same family who are also said to be interested in the mortgaged property. Defendants 14 to 20 are in possession of some portion of the suit property under defendants 1 to 13. The plaintiffs' suit was decreed in full on 29-6-1956. An appeal was preferred by defendants 1 to 13 and 20 against the decree. The Appellate Court by its order dated 14-4-1958 framed an additional issue No. 4 and remanded the suit to the Lower Court for a fresh finding on that issue. Against that order of remand the plaintiffs filed Civil Revision No. 230 of 1958 on 30-6-1958. During the pendency of that civil revision, defendant No. 13 Sapani Bhoi died on 6-7-1958. Then on 8-12-1958, on the application of the plaintiffs, his legal representative was duly substituted and the civil revision was eventually dismissed on 22-12-1959. Then on 5-12-1960 the trial Court submitted its findings on issue No. 4 and the Appellate Court on 11-3-1961

passed a modified decree. But presumably due to inadvertence the substituted heir of defdt. No. 13 Sapani was not made a party either before the First Appellate Court or before the trial Court when the finding on issue No. 4 was being canvassed. The result is that the modified decree of the First Appellate Court D/- 11-3-1961 contains the name of Sapani Bhoi. In the second appeal the plaintiff while impleading the other defendant respondents did not implead the legal representative of Sapani Bhoi saying that he died during the pendency of the appeal and his legal representative was not substituted there.

2. The first question for consideration is what is the effect of the substitution of the legal representative of Sapani Bhoi on 8-12-1958 in Civil Revision No. 230 of 1958. Will that substitution enure for the benefit of the Civil Revision only or will it be for the benefit of the suit at all subsequent stages? This point is concluded by the decision of the Privy Council reported in *Brij Inder Singh v. Lala Kanshi Ram* AIR 1917 PC 156 where their Lordships observed, "The introduction of a plaintiff or a defendant for one stage of the suit is an introduction for all stages." There also the substitution was made in a civil revision and that was held to apply in respect of the pending appeals also.

3. In all subsequent decisions of the High Courts where this decision of the Privy Council has been followed it has been observed that where there were two different suits this principle may not apply: See *Shankaranaraina Saralaya v. Laxmi Hengsu* AIR 1931 Mad 277 and *Punjab State Vs. Sardar Atma Singh*, . But here as there is one suit throughout the Privy Council decision will apply with full force. Hence it must be held that in law before the lower Appellate Court and trial Court after remand there was substitution of the legal representative of Sapani.

4. The next question for consideration is: what is the effect of the failure to implead the legal representative of Sapani as a respondent in this second appeal? The plaintiffs were fully aware of the death of defendant No. 13, Sapani and also of the order of substitution passed in the aforesaid Civil Revision because it was made on their application. Hence their taking refuge under the excuse that as the legal representative of Sapani was not impleaded in the decree of the Lower Appellate Court she was not impleaded here in the Second Appeal is quite futile. Sapani's legal representative is a necessary party as she had interest in the mortgaged property and by not impleading her as a legal representative in this Second Appeal the appeal must be held to be incompetent.

5. It also appears that defendant No. 14 had died though the date of his death is not known. His legal representative has not been made a party at any stage. But as he was ex parte throughout, the omission to substitute his legal representative may not be material because he has no interest in the mortgaged property, he being only in possession of a portion of the property under the mortgages. Moreover, under the Orissa Amendment of Order XXII, Rule 4 of the CPC it is not necessary to substitute his legal representatives.

6. For these reasons, we confirm the judgment and decree of the Lower

Appellate Court and dismiss the Second Appeal as incompetent. There will be no order for costs.

R.K. Das, J.

7. I agree.