
(1919) 07 CAL CK 0021
In the Calcutta High Court

Kali Dayal Bhattacharjee and Others

APPELLANT

Vs

Nagendra Nath Pakrashi and Others

RESPONDENT

Date of Decision : 28-07-1919

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 11, Order 22 Rule 4(3)
Criminal Procedure Code, 1898 (CrPC) — Section 145

Citation : 54 Ind. Cas. 822

Hon'ble Judges : Panton, J; Asutosh Mookerjee, J

Bench : Division Bench

Judgement

1. This is an appeal by the defendants in a suit for declaration of title to Immovable property. The case for the plaintiffs is that there were disturbances in connection with the lands in suit which led to the institution of proceedings u/s 145, Criminal Procedure Code : with the result that, on the 24th July 1910, the Criminal Court made an order of attachment u/s 146, Criminal Procedure Code, to remain in force until the title to the lands was declared by a Civil Court of competent jurisdiction. Accordingly, on the 28th September 1910, the plaintiffs instituted the present suit for declaration that the disputed lands appertained in Zemindary right, and right acquired by adverse possession, to their property known as Thal Chur or as Khas Thal Mouza. The defendants repudiated all the material allegations in the plaint. After a protracted trial in the Court below, the suit was decreed by the Subordinate Judge. The decree in favour of the plaintiffs was in the following terms: "The title of the plaintiffs is declared to the entire lands included in the survey map of Mouza Chur Thal alias Khas Thal in claim, and also to such quantity of land as is shown in the map of the Commissioner as included in the survey of Mouza Khas Thal and lies within the lands claimed." The present appeal by the defendants is directed against this decree. The appeal was heard for several days and the respondents were called upon to answer the arguments advanced on behalf of the appellants. It then transpired that Lal Mohan Pakrashi, one of the plaintiffs respondents, had died in November 1915, and that adequate steps had not been taken to revive the appeal as against his

representatives-in-interest, Lal Mohan Pakrashi has left a widow, three sons and two grandsons by a predeceased son. No application was made by the appellants to bring on the record the legal representatives of the deceased respondent within the time allowed by law, that is, within a period of six months from the date of the death of the deceased respondent, under Article 177 of the First Schedule to the Indian Limitation Act, 1908. The consequence was that under Order XXII, Rule 4, sub-Rule 3 of the Code of Civil Procedure, 1908, read with Rule 11, the appeal abated as against the deceased respondent. On the 23rd February 1917, an application was made to this Court to bring on the record the three sons of the deceased respondent. This was not made in the form of an application to set aside the abatement as contemplated by Order XXII, Rule 9, sub-rule. (2), It was also made beyond the time prescribed by Article 171 of the First Schedule to the Indian Limitation Act, 1908, that is, after the expiry of days from the date of abatement. The application was made ex parte and was based on an affidavit which contained an untrue statement, namely, that Lal Mohan Pakrashi had died in November 1916. If he had really died in November 1916, the six months prescribed by Article 177 of the Indian Limitation Act would have expired in May 1917 and consequently no question of limitation could possibly arise in respect of an application made on the 23rd February 1917. The result of the misstatement was that the application was granted as a matter of course. This was brought to the notice of the Court on behalf of the respondents when they were called upon to answer the arguments of the appellants. The position thus was that two of the representatives of Lal Mohan Pakrashi, namely, his two grandsons by a predeceased son, were not on the record, while the names of his three sons had been placed on the record, on the basis of an untrue statement contained in the affidavit filed in support of the application for" substitution. An attempt was subsequently made to induce this Court to bring on the record the two grandsons by the predeceased son. The explanation offered for the delay was, however, unsatisfactory, and under Order XXII, Rule 9, Sub-rule (3), which makes the provisions of Section 5 of the Indian Limitation Act applicable, no order could be made in favour of the applicants, as they had failed to satisfy the Court that they had sufficient cause for not making the application within the prescribed time. We accordingly directed, on the 2nd July last, that the ex parte order made on the 23rd February 1917, on the basis of an untrue statement be cancelled, and, further, that the application to bring on the record the grandsons by the predeceased son be refused. The position accordingly is that the appeal has abated as regards Lal Mohan Pakrashi, and the application to revive the appeal against his representatives has failed. The appeal has now been taken up for final disposal.

2. On behalf of the respondents, a preliminary objection has been taken that in the events which have happened the appeal cannot proceed and must be dismissed. It is conceded that under the provisions of Order XXII, Rule 4, read with Rule 11 the appeal has abated only as against the deceased respondent. Consequently, we have to determine whether, in view of the nature of the suit,

such partial abatement has made it impossible for the Court to hear the appeal as against the other respondents, and, if necessary, to reverse the decision of the trial Court in their favour, The respondents have contended that this question should be answered in the affirmative, in view of the decisions in Bejoy Gopal Bose v. Umesh Chandra Boss 6 C.W.N. 196; Tarip Dafadar v. Khoterunnessa Bibi 10 C.W.N. 981; Dharamjit Narayan Singh v. Chandeshwar Prosad Narayan Singh 11 C.W.N. 504 : 5 C.L.J.393; Basir Sheikh v. Fazle Karim 28 Ind. Cas 703 : 19 C.W.N. 290; Azimuddin Mandal v. Tara Sankar Ghose 47 Ind. Cas. 638 : 28 C.L.J. 201 and Sriram Chandra Naik v. Hridoy Nath Gupta 51 Ind. Cas. 409 : 29 C.L.J. 461. The appellants have, on the other hand, invited our attention to the cases of Chandarsang v. Khimabhai 22 B. 718 and Upendra Kumar Chakravarti v. Sham Lal Mandal 34 C. 1020 : 11 C.W.N. 1100 : 6 C.L.J. 715 which it is urged support the contrary view. In Bejoy Gopal Bose v. Umesh Chandra Rose 6 C.W.N. 196 and Turip Dafadar v. Khotiannessa Bibi 10 C.W.N. 981 the question arose as to the effect of the death of one of several plaintiffs respondents in an appeal preferred against a joint decree for arrears of rent, in favour of all the plaintiffs. In both these cases, the Court held that the appeal could not proceed for defect of parties. In the first case Mr. Justice Banerjee pointed out that if the appeal were heard and allowed on the merits, the result would be that the decree would be set aside in respect of some of the plaintiffs, but would remain intact in so far as the representatives of the deceased plaintiff were concerned. The decree was a joint decree in favour of all the plaintiffs and if the defendant desired to question the correctness of that decree, he was bound to bring before the Court all the parties affected by that decree. In the second case, Mr. Justice Rampini adopted the same view and dismissed the appeal, as it could not proceed by reason of defect of parties. Mr. Justice Rampini, however, in the case of Upendra Kumar Chakravarti v. Sham Lal Mandal 34 C. 1020 : 11 C.W.N. 1100 : 6 C.L.J. 715 took a different view on the Authority of the decision in Chandarsang v. Khimabhai 22 B. 718. No reasons were assigned in support of the conclusion and the earlier decisions were not brought to the notice of the Court. We observe that in that case a question was raised as to the area and the amount of rent annually payable in respect of the holding. The Court dismissed the appeal on the merits : but if the appeal had succeeded, the result would have been two contradictory decisions in the same suit in respect of the same matter, namely, the terms and conditions of the tenancy, one given by the lower Appellate Court in favour of the deceased plaintiff which would enure to the benefit of his representatives-in-interest, the other given by the High Court in favour of the successful appellant.

3. The case of Dharamjit Naraym Singh v. Chandeshwar Prosad Narayan Singh 34 C. 1020 : 11 C.W.N. 1100 : 6 C.L.J. 715 arose out of a suit for the cancellation of a sale for arrears of land revenue, The trial Court set aside the sale. During the pendency of an appeal to this Court, two of the plaintiffs-respondents died. No application was made to bring their legal representatives on the record within the prescribed period. The Court held that the appeal could

not proceed. Mr. Justice Harrington applied the test, whether the suit would have been tried, if the deceased persons had not been joined either as plaintiffs or as defendants. He held that the suit could not have been tried in their absence, and that consequently the appeal also could not be decided in the absence of their legal representatives. The decree could not be reversed and the sale directed to stand in respect of some of the plaintiffs, while the decree for cancellation made by the primary Court would remain in operation as regards the others. The Court further declined to accede to the contention that the share of the plaintiffs other than those of the deceased persons could be vacated by an order of this Court. The contention was negatived on the ground that as the decree under appeal had set aside the sale of the entire joint estate, under no circumstances could that be affirmed as to the unascertained shares of some joint shareholders and reversed as to the unascertained shares of other joint shareholders.

4. This principle was applied to suits for possession in *Basir Sheikh y. Fazle Karim* 28 Ind. Cas 703 : 19 C.W.N. 290 and *Sriram Chandra Naik v. Hridoy Nath Gupta* 47 Ind. Cas. 638 : 28 C.L.J. 201. In the first of these cases it was pointed out that as the decree was one for joint possession of land, whatever view might be taken by this Court on the merits, the entire decree could be executed by the representatives of the two plaintiffs who were dead and against whom the appeal had not been revived. In the second case, the Court observed that the appeal was not properly constituted in the absence of the infant representatives of one of the deceased respondents and the Court could not be called upon to make two contradictory decrees in the same litigation. The infant plaintiff had got a declaration of the true character of the property and was entitled to take possession of it from the hands of the first defendant by execution of his decree : the Court could not declare that the other plaintiffs, although they stood in the same relation to the property in suit as the infants, were not entitled to the same relief.

5. Another example of the application of the principle deducible from the cases mentioned is furnished by *Azimuddin Mandal v. Tara Sankar Ghose* 47 Ind. Cas. 638 : 28 C.L.J. 201. A and B (landlords) had applied u/s 105, Bengal Tenancy Act, for settlement of fair rent and for enhancement of rent. A died after the decision of the lower Appellate Court, leaving a major son C and a minor son D as his heirs. The tenant defendants-appellants did not take steps to have the minor properly represented and the appeal was dismissed against him for non-prosecution. It was ruled that the entire appeal had become incompetent for want of necessary parties.

6. These decisions do not contradict Order XXII, Rule 4, which contains the words--"as against the deceased respondent"--not found in the corresponding provision (Section 368) of the Code of 1882. The appeal does not abate in its entirety, because the appellant has failed to revive it against the legal representatives of the deceased respondent, the abatement takes effect "only as against him : but from the nature of the suit, the result may follow that the

appeal his thereafter become imperfectly constituted, so that the appellant can no longer invite the Court to adjudicate upon the matter? to controversy.

7. The question now arises, whether this doctrine is applicable to the case before us. In our opinion, there is no escape from the position that the answer must be against the appellants. In fact the present ease is, in some respects, stronger than any brought to our notice. The plaintiffs jointly sought a declaration that the lands attached by order of the Criminal Court were included in their estate. No question of shares was in controversy : the Subordinate Judge made in favour of the plaintiffs a declaratory decree in respect of the whole property. The representatives of the deceased plaintiffs are entitled to the full benefit of this decree. If we proceed to hear the appeal at the instance of the defendants against the other plaintiffs, the result will follow, should the contention of the appellants prevail on the merit?, that there will be two contradictory declarations in the same suit--one by the Subordinate Judge in favour of one of the plaintiffs that the disputed lands are included within Thal Chur, and another by this Court that they are not so included. If these contradictory declarations are produced before the Collector, it is difficult to see how he can give effect to both of them. It may further be observed that the defendants have not brought a suit for declaration of their title and their right to institute such a suit is barred by limitation. In our opinion it is manifest that in the events which have happened the appeal is now not properly constituted, and in the absence of necessary parties we cannot proceed to hear it on the merits. The appellants alone are to blame for the unfortunate position in which they now find themselves.

8. The appellants have next argued that as the estate was in the hands of a common manager appointed under the provisions of the Bengal Tenancy Act, it was not necessary for them to bring on the record the heirs of the deceased plaintiff. In support of this contention, they have relied upon *Sibo Sundari v. Raj Mohun* 8 C.W.N. 214; *Kirtibash Das v. Umesh Chandra* 11 Ind. Cas. 397 : 14 C.L.J. 61 : 16 C.W.N. 96. These decisions are of no assistance to the appellants. In the first place, the suit was not brought by the common manager on behalf of the plaintiffs. Whether he was competent to institute a suit of this character on their behalf without naming them as parties on the record, need not, consequently, be considered. From this point of view, it is also unnecessary to determine whether the two decisions just mentioned did not take an unduly comprehensive view of the powers of a common manager. In the second place, our attention has been drawn to the fact that the common manager was appointed without jurisdiction (as the appointment was made in respect of a share only of an estate) and that on this ground the appointment was cancelled by this Court on the 3rd February 1919.

9. As a last resort, the appellants have contended that we should proceed, under Order XLI, Rules 20 and 33, to add the representatives of the deceased respondent as parties to the appeal. In, support of this argument, reference has been made to *Upendra Lal Mukerjee v. Girindra Nath Mukerjee* 25 C. 565 : 2

C.W.N. 425; Hudson v. Basdeo 26 C. 109 : 3 C.W.N. 76 and Bup Jaun Bibee v. Abdul Kadir 31 C. 643 : 8 C.W.N. 496. We are clearly of opinion that assuming that the Court is competent to take action under the rules mentioned, this is a case in which the powers should not be exercised for the benefit of the appellants and to the detriment of the legal representatives of the deceased respondent. The appellants obtained an ex parte order against some of them on a misrepresentation of fact : that order has been cancelled. As regards the other representatives of the same respondent, the omission to proceed against them was due solely to negligence. We feel no doubt that it will be wrong to allow the appellants to invoke the aid of the rules in question in these circumstances.

10. The result is that this appeal is dismissed. We make no order as to costs, inasmuch as the respondents should have brought this matter to the notice, of the Court as soon as the appeal was taken up for disposal.