

(1971) 11 OHC CK 0009
In the Orissa High Court
Case No : Second Appeal No. 158 of 1968

Kanungo Khagendranath Das Mohapatra and Others	APPELLANT
Vs	
Jadabendra Narayan Patnaik	RESPONDENT

Date of Decision : 29-11-1971

Acts Referred:

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

Citation : AIR 1972 Ori 161 : (1972) 38 CLT 129

Hon'ble Judges : S.K. Ray, J

Bench : Single Bench

Advocate : R. Das, P.K. Das and J. Swain, for the Appellant; P. Roy, for the Respondent

Final Decision : Allowed

Judgement

S.K. Ray, J.—This second appeal is by defendants 1, 2, 15 and 16 to 20 from the reversing decision of the Subordinate Judge of Balasore decreeing the plaintiffs suit for damages, but reducing the amount of claim from Rs. 700/- to Rs. 200/-.

2. The suit was for recovery of damages amounting to Rs. 700/- for trespass committed by the defendants jointly upon his land described in Sch. Ka of the plaint. Plaintiff set out his case of acquisition of title to the suit-land in the plaint, and alleged that the defendants who had no manner of right, title and interest over the suit-land trespassed in a body and caused damage thereby giving cause of action to the suit.

3. Of the 20 defendants, defendants 1, 3, 5 to 10 and 14 to 20 contested. They disputed the plaintiffs claim of title to the suit-property and claimed that the said land is communal land belonging to the villagers. Their further defence also was that no such occurrence of trespass by the defendants in a body ever took place in fact.

4. The trial court dismissed the suit upon a finding that the plaintiff had neither title, nor possession over the suit-land and that the disputed land was communal

land. There was no damage caused in fact.

5. The plaintiff appealed. He impleaded all the defendants as respondents in his appeal. During the pendency of the appeal defendant 15 died on 8-10-66. The plaintiff filed a petition dated 7-1-67 expunging his name from record and accordingly the name of defendant 15 was expunged by order dated 16-2-67. Thereafter the lower appellate court passed his decree on 10-1-68 reversing the decision of the trial court and decreeing the suit for damages of Rs. 200/-. It may be incidentally noted that while reversing the decision of the trial court he rendered no finding regarding the plaintiffs title to and possession over the suit-land or the defence case of denial of the allegation of trespass.

6. A point has been taken by the appellant that the appeal in the lower appellate court having abated against defendant 15, the consequence was the whole appeal abated. If this point succeeds then the decision of the lower appellate court is bound to be set aside and it would be unnecessary to go into the other points regarding the merits of the case raised by the appellant. I, therefore, passed an order in this appeal recording that this point shall first of all be decided and if this point succeeds the whole appeal will be disposed of on that point. If this point fails, then the matter shall be placed for further hearing on merits.

7. The trial court's decree was in the following terms:

"The suit is dismissed on contest against defendants 1, 3, 5 to 10 and 14 to 20 with costs and without costs as against the other defendants set ex parte. Pleader's fee at 6 1/2%.

Plaintiff do pay to the defendants 1, 3, 5 to 10 and 14 to 20 a sum of Rs. 59.69 at costs of this suit."

This decree was a joint one. All these defendants in their defence took the common ground that the land in dispute was communal and did not belong to the plaintiff, nor was the plaintiff in possession of the same and this defence found favour with the trial court resulting in the dismissal of the suit as aforesaid. The plaintiff was also liable to pay costs to all the contesting defendants including D-15 under the decree of the trial court.

8. In the context of the aforesaid facts the limited question is whether the appeal in lower appellate court abated as a whole. It is not disputed that the appeal abated against the defendant No. 15 in the lower appellate court. It is also not in dispute nor can it be conceivably disputed that the decree of the trial court proceeded on a ground common to all the defendants and it made the plaintiff liable for costs, to all the contesting defendants. The decree was, therefore, a joint and several one. The general rule is that the Court in every suit and appeal will deal with matters in controversy so far as regards the rights and interests of the parties actually before it. The necessary corollary is that the appellate court has to deal with matters in controversy so far as regards the rights and interest

of the appellant and respondents other than deceased respondent if it is possible to so decide and when it is not possible to deal with such matters it will refuse to proceed further with the appeal and therefore dismiss it.

The Supreme Court in the case of *The State of Punjab Vs. Nathu Ram*, , after noticing the aforesaid general rule and its corollary has stated:

"The question whether a court can deal with such matters or not, will depend on the facts of each case, and therefore, no exhaustive statement can be made about the circumstances when this is possible or not possible. It may, however, be stated that ordinarily the considerations which weigh with the Court in deciding upon the question are whether the appeal between the appellants and the respondents other than the deceased 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. The test to determine this has been described in diverse forms. Courts will not proceed with an appeal:

(a) When the success of the appeal may lead to the Court's coming to a decision which would 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 tests set out in this decision of the Supreme Court have also been accepted in a subsequent decision of the Supreme Court in AIR 1966 SC 1427. This latter Supreme Court decision further explains that the result of total abatement will flow even if one of the three tests is fulfilled, and it is not necessary, to bring about that result, that all the three tests must coexist.

8A. In my opinion, of the three tests laid down by the Supreme Court in *The State of Punjab Vs. Nathu Ram*, , the test (a) is applicable. The result of the abatement of the appeal against defendant No. 15 in the lower appellate court is that his legal representatives are entitled to recover costs from the plaintiff and can enjoy the suit-land as the communal land of the villagers, and can disclaim and, ignore the title of the plaintiff, because, as, already stated, the ground for dismissal of the suit is that he is not the owner of the suit-land and that the suit-land is communal land of the village and that he was also not in possession and that the defendants never trespassed upon this land in the manner alleged by the plaintiff. The reversal of the decision of the trial court would mean that the suit-land is not the communal land, and that it belongs to the plaintiff and is in latter's possession and that all the defendants trespassed upon the suit-land in a body and that the plaintiff is not to pay costs to any of the original defendants. It is not difficult to see that with regard to certain common questions, viz., the

character of the suit-land and title of the plaintiff to it as decided by the lower appellate court would be in conflict with the decision with regard to the same matters by the trial court which have become final so far as defendant 15 is concerned. The further conflict would be in the matter of awarding costs by one party to the other. I am, therefore, satisfied that the success of the plaintiff in the lower appellate court would lead to the aforesaid conflicts between the decision of the trial court and that of the lower appellate court because of the finality that would attach to the decision of the trial court so far as the deceased respondent 15 is concerned. The result is that the appeal in the lower appellate court must be taken to have abated in its entirety.

9. For the aforesaid reasons, I accent the contention of the appellant and hold that M. A. 6/66 in the Court of the Subordinate Judge, Balasore, could not proceed as it abated in its entirety. The judgment and decree, therefore, of the Subordinate Judge, Balasore, are set aside and those of the trial court are restored.

The appellant will be entitled to his costs throughout.