

(1936) 11 BOM CK 0020
In the Bombay High Court

Khodadad Mundegar and Another

APPELLANT

Vs

Bai Jerbai and Others

RESPONDENT

Date of Decision : 27-11-1936

Acts Referred:

Succession Act, 1925 — Section 251

Citation : AIR 1938 Bom 6

Hon'ble Judges : Engineer, J

Bench : Division Bench

Judgement

Engineer, J.—The claim in the suit is an extraordinary one. The plaintiffs pray for the dissolution and accounts of what they call a family partnership business, which, according to them, was dissolved on 1st October 1933. The parties to the suit are Irani Zoroastrians. The basis on which their claim is made is set out in para. 6 of the plaint as follows:

2. An ancient Invariable and well-known custom prevails among Iranis who have settled down in Bombay that they carry on family business in partnership and every male member of the family joins such family business and acquires an equal share in the profits and losses as well as the assets of the firm with the other members of the family who have previously joined such family business.

3. The family partnership business mentioned in the plaint is alleged to have started in 1892, when Behram, the eldest brother of plaintiff 1, having come to Bombay, started a tea-shop. In 1897 the second brother Merwan, who was the original defendant 1 in the suit, is alleged to have joined his elder brother Behram in business. In 1904 the third brother Boman, defendant 10, is alleged to have come into the partnership. In 1906, another brother named Faredoon, who has since died, is said to have come into the partnership. In 1908 the plaintiff himself is alleged to have joined the partnership. In 1912 Behram, the eldest brother, died, and his share in the partnership is alleged to have been given to his widow, plaintiff 2, who subsequently married plaintiff 1. In 1922 Faredoon died, and the partnership is alleged to have continued with the

surviving partners. In 1926 Ardeshir, the son of Behram, and Rustom, who is the son of Boman, defendant 10, are alleged to have come into the partnership. In 1929 Ardeshir died, and the partnership is said to have been continued by the surviving partners. In January 1933 Rustom and Sohrab, the two sons of Merwan, the original defendant 1, are alleged to have come into the partnership. Thus, from the time plaintiff 1 is alleged to have joined the partnership, there were six firms constituted differently from time to time, and accounts of these firms are sought to be taken in the suit; from 1912, when plaintiff 2 became a partner, there were five firms differently constituted from time to time.

4. One feature of plaintiffs' case, as alleged in the plaint, is the allegation that as soon as a male member of the family attains majority, he not only becomes entitled to be a partner in the business but also becomes automatically entitled to an equal share, not only in profit and loss, but also in the assets of the firm, with the other members of the family who have previously joined the family business. The original defendant 1 and defendants 2, 3, 8, 9 and 11 filed a written statement in which they denied the alleged custom and denied all the relevant facts on which the plaintiffs' claim is founded. It was denied that the original defendant 1, Merwan, was at any time a partner in the business started by his brother Behram Mundegar and alleged to have been carried on either by himself or in partnership with his brothers. It was also denied that the said Behram or the plaintiffs had any concern with or interest in the several businesses which were started and carried on by the original defendant 1, Merwan, as set out in detail in their written statement.

5. Obviously the suit as framed is not maintainable, if by the plaint the plaintiffs seek dissolution and accounts of the various firms aforesaid. One of the issues raised was whether the suit as framed was maintainable. Thereupon counsel for the plaintiffs stated that the plaintiffs restricted their claim in the suit to the partnership which, according to them, came into existence in January 1933 and which was dissolved on 1st October 1933. The plaintiffs asked for leave to amend the prayers of the plaint by asking for a declaration that the partnership, which was formed in January 1933, was dissolved on 1st September 1933, or on the date of the filing of the suit, and by substituting in the subsequent prayers the words "the said partnership" for the words "the said family partnership firm." Leave to amend the plaint was given, and the plaint now stands amended in that manner.

6. Another defect in the suit is that defendants 2 and 3 are the same as defendants 8 and 9. It appears that the original defendant 1 was Merwan Mundegar, but he died a few days after the suit was filed, and in his place his widow and children were brought on the record. Amongst his children are Rustom and Sohrab, who were alleged to be the partners in the suit firm. It appears further that Merwan left a will, and that probate of the will was obtained by defendant 1, his widow. The legal representative of Merwan was thus his executrix, defendant 1, and it became necessary further to amend the plaint by

describing defendant 1 as the executrix of the will of her deceased husband. Leave to make the said amendments was given to the plaintiffs and the plaint now stands amended by having defendant 1 as a party to the suit in her capacity as executrix of the will of her deceased husband. This makes the presence of defendants 2 to 7 unnecessary, and the suit will have to be dismissed as against them, or their names will have to be struck off. But there appears to be another and more formidable difficulty in the way of the plaintiffs, and that is that defendant 8 died in January 1935 and no application was made to cause his legal representative to be made a party to the suit, although a year and ten months have elapsed since his death. The suit has therefore abated.

7. It was however contended on behalf of the plaintiffs that defendant 1, who is the mother of defendant 8, is his only heir, and that defendant 1 being already on the record, although in another capacity, the suit has not abated. The Lahore and Madras High Courts have held that under such circumstances it is not necessary to make an application under Order 22, Rule 4, Civil P.C, and the suit or appeal does not abate. The decisions which lay down this proposition are *Gopal Das v. Mul Chand* AIR 1926 Lah 607, *Sardar Shah v. Mt. Sardar Begam* AIR 1928 Lah 893, *Atma Ram v. Banku Mal* A.I.R 1930 Lah 561 and *Aehutan Nair v. Manavikraman* A.I.R 1929 Mad. 152. The reasoning of the rule thus laid down appears to be that the provisions of Rule 2 of Order 22, Civil P.C., are independent of the provisions of Rule 3 or Rule 4. Rule 2 provides that:

Where there are more plaintiffs or defendants than one, and any of them dies, and where the right to sue survives to the surviving plaintiff, or plaintiffs alone, or against the surviving defendant or defendants alone, the Court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants.

8. In *Gopal Das v. Mul Chand* AIR 1926 Lah 607 the respondent who died pending the appeal was a Hindu minor and his legal representatives were his brothers who were co-plaintiffs and respondents with him, and it was stated that the right to obtain relief survived against them alone, and therefore all that was necessary was to make an entry to that effect, as provided by Order 22, Rule 2, Civil P.C. It does not appear from the report what the nature of the suit was, nor whether the three brothers, who were plaintiffs and who subsequently became respondents, were joint in estate. In *Sardar Shah v. Mt. Sardar Begam* AIR 1928 Lah 893 it appears that the respondent who died pending the appeal, although a party, was an entirely unnecessary party to that suit. The suit was filed by the son of the donor of the gift against the daughter to whom a gift of part of the property of the donor was made, and that suit was restricted to the claim as against the daughter? As regards the gift made to the sister, a separate suit was filed against her, which was decreed; and the sister appealed against the decree, but she having died during the tendency of the appeal, her appeal abated? It is clear, therefore, that *Sardar Shah v. Mt. Sardar Begam* AIR 1928 Lah 893 is not

an authority for the proposition stated above. The suit could have proceeded just as well without her having ever been made a party to it, and her death, either pending the suit or appeal, could be ignored with out any prejudice to the further conduct of the suit. *Atma Ram v. Banku Mal* A.I.R 1930 Lah 561 the suit had been instituted by two Hindu brothers to enforce an agreement which had been entered into for the benefit of the joint family? After the decree was passed and an appeal was filed by the defendant, one of the plaintiffs who was respondent 1 died and as no application was made to bring his legal representatives on the record within the time prescribed by law, it was contended that the appeal had abated? But it was pointed out that in that litigation Banku Mai as the manager represented the entire family, and on his death the manager ship admittedly devolved on his elder son Bhandari, who was already on the record... It was held that in those peculiar circumstances, and on those facts, it was not necessary for the appellants to implead Sudaman, the younger son of Banku Mai, as a party respondent to the appeal, as he, like any other member of the joint family that might be in existence, was effectively represented by Bhandari, the surviving plaintiff and respondent on whom the managership had devolved. The decision in *Aehutan Nair v. Manavikraman* A.I.R 1929 Mad 152 only follows *Gopal Das v. Mul Chand* AIR 1926 Lah 607. The report of the case does not state what the nature of the suit was, nor who were the legal representatives who were said to be already on the record? There is also a decision in *Maung Po v. Ma Shwe Ma* A.I.R 1926 Rang 95 to the same effect.

9. On the other hand the Patna High Court has held in *Lilo Sonar Vs. Jhagru Sahu*, and *Basist Narayan Singh and Others Vs. Modnath Das and Others*, that the fact that one of the legal representatives of a deceased respondent was already on the record, but not as such, did not prevent the abatement of the appeal, and the appellant was not thereby relieved from the duty of applying within time for the substitution of the legal representatives of the deceased respondent in terms of Order 22, Rule 4, Civil P.C.

10. There does not appear to be any decision of the Bombay High Court on this point. The defendants' contention that there was no abatement, and that it was unnecessary to make an application under Order 22, Rule 4, cannot succeed, unless it is established (a) that the right to sue survives against the surviving defendants alone, and (b) that defendant 1 is the legal representative of the deceased defendant 8? In my opinion the cases contemplated by Order 22, Rule 2, are those where, e.g. suits are filed by or against executors, or trustees, or against joint tortfeasors, or against the members of a joint Hindu family on the death of one of whom his interest in the subject matter would cease. The Rule does not seem to contemplate any defence being made by the legal representatives of a deceased defendant? It may well be that the legal representative of a deceased defendant is already on the record, though, in another capacity, but unless the death of that defendant is stated in the pleadings, and unless it is stated that the particular defendant who is already on the record is his legal representative and is therefore sued as such legal

representative also, I do not see how that party could enter on any defence appropriate to his character of a legal representative of the deceased defendant I am of opinion, agreeing respectfully with the decisions of the Patna High Court, that the fact that the legal representative of a deceased defendant is already on the record, but not as such, does not prevent the abatement of the suit, and the plaintiffs are not thereby relieved from the duty of applying within time for the substitution of the legal representative of the deceased defendant. But apart from those contentions, can it be said that defendant 1 is in this case the legal representative of the deceased defendant 8? Section 2, Sub-section (11), Civil P.C., defines "legal representative" as meaning

A person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or so sued.

11. The parties are governed by the Indian Succession Act. Section 211 of that Act provides that:

The executor or an administrator, as the case may be, of a deceased person is his legal representative for all purposes and all the property of the deceased person vests in him as such.

12. An heir of a Parsi is not his legal representative: see *Framji Dorabji v. Adarji Dorabji* (1894) 18 Bom 337. In *Messrs Barnett Brothers v. Mrs. E. Fowle* AIR 1925 Rang 186 the defendant E. Fowle died during the pendency of the suit, and the widow and brother of the deceased were brought on the record in his place, they being his heirs. It was held that they were not the legal representatives of the deceased, and the suit against them was dismissed. It is therefore not possible to say that the legal representative of the deceased defendant 8 is already on the record, although in a different capacity. As a matter of fact, after the amendment above mentioned, defendant 1 is brought on the record as executrix of the will of her deceased husband, and in my opinion it is not possible to say that the suit can proceed against the surviving defendants alone. I do not overlook the fact that only one written statement has been filed, inter alia, by defendant 1 and defendant 8 in the suit, but in my opinion this does not affect the question at all. I therefore hold that the suit has abated as against defendant 8. The present suit is by some partners of the firm for dissolution and for accounts, and the suit is of such a nature that if one of the defendants dies, and his legal representative is not brought on the record, the suit abates as a whole. I therefore hold that the suit has abated as a whole.

13. The learned Counsel for the plaintiffs in the alternative submitted that if necessary an order be made setting aside the abatement. It was suggested that the legal advisers of the plaintiffs remained under the impression that it was not necessary to make an application under Order 22, Rule 4. It appears that shortly after the death of defendant 8, there was correspondence between the parties.

The defendants' attorneys informed the plaintiffs' attorneys on 29th January 1935 that defendant 8 had died the previous day. The plaintiffs' attorneys wrote back on 30th January asking the defendants who were the heirs and legal representatives of the deceased defendant. The defendants' attorneys wrote back on the same day, stating that it was for the plaintiffs to ascertain who were the heirs and legal representatives of defendant 8. This correspondence has been put in as Ex. 1.

14. The provisions of Section 5, Limitation Act, 9 of 1908, apply to an application under Sub-rule (2) of Rule 9 of Order 22, Civil P.C. and I am asked to excuse the delay of about a year and ten months, which has happened in this case. The application is made on the assumption that defendant 1 is the legal representative of defendant 8; but I am not satisfied that that is so. It was argued that if defendant 1 does not choose to take out letters of administration to the estate of her son, defendant 8, the plaintiffs are helpless in the matter, and that there can be no legal representative of the estate of defendant 8. It is argued that the plaintiffs themselves cannot, as claiming to be the creditors of defendant 8, take out letters of administration to the estate of defendant 8, because then there would be a conflict of interest, and the person who takes out such letters will be the plaintiff as well as the defendant in effect. A similar difficulty was felt and expressed in *Ratanbai v. Narayandas* AIR 1927 Bom. 474 But this overlooks the provisions of Section 251, Succession Act, which provides that:

When it is necessary that the representative of a person deceased be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit....

15. However queer the plaintiffs' case might appear to be, I feel that I must give them an opportunity of proving their claim; but it is only on terms that I am prepared to make an order setting aside the abatement of the suit. The terms which I think should be imposed upon the plaintiffs are that they must in any event pay the costs of the hearing of the suit on 16th November 1936 and 17th November 1936, and the payment of these costs will be a condition precedent to the setting aside of the abatement. The order which I make is that if the plaintiffs deposit in Court a sum of Rs. 500 within three weeks from the date hereof as security for the payment to the defendants of the costs of the hearing on 16th and 17th November 1936, which I award to them, the plaintiffs will have three months from this date within which to arrange to apply for and obtain letters of administration to the estate of defendant 8 in favour of some nominee of theirs, and in the event of such letters being obtained, the party to whom such letters are granted will be substituted in place of defendant 8 as his legal representative, and the suit will then proceed further. For this purpose, the suit will be placed on board on 8th March 1937. In the event of the said sum not being deposited within three weeks from the date hereof, the suit will be

declared to have abated, and in that event the suit will be placed on board on 21st December 1936, for the necessary orders.