
(1950) 02 PAT CK 0017
In the Patna High Court
Case No : A.F.A.D. No. 41 of 1945

Madhusudan Lal

APPELLANT

Vs

Sailendra Kishore

RESPONDENT

Date of Decision : 21-02-1950

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 4(3), Order 22 Rule 9, 99
Suits Valuation Act, 1887 — Section 11, 11(1)

Citation : AIR 1950 Patna 359

Hon'ble Judges : Reuben, J;Jamuar, J

Bench : Division Bench

Advocate : G.P. Das and Shambhu Nath, for the Appellant; Mahabir Prasad and P. Srivastava, for the Respondent

Final Decision : Dismissed

Judgement

Jamuar, J.—A preliminary objection was raised on behalf of the respondent in this appeal that the appeal had abated. The appeal was filed on 23rd January 1945, and the respondent was one Ram Babu. It appears that on 28th March 1947, Ram Babu executed a will leaving his entire estate to one Sailendra Kishore, his sister's daughter's son, and appointing his father Nand Kishore Chand as the executor. Ram Babu died on 12 September 1947. On 10th October 1947, an application for probate of the will was filed. On 20th November 1947, an application was made in this Court for the substitution of Ram Babu's widow, Mt. Annapurna Devi, in place of Ram Babu, and on 8th December 1947, another application was filed to add Sailendra Kishore as a party respondent under the guardianship of his father Nand Kishore Chand in addition to Mt. Annapurna Devi. In answer to the two petitions filed by the appellant for substitution, on 31st January 1918, Nand Kishore Chand filed an application informing the Court that he had been appointed the sole executor in the will of Ram Babu and thus he was the only legal representative and as he had not been brought on record till then, the appeal had abated. Notices were issued to Mt. Annapurna Devi and upon Sailendra Kishore. On 12th May 1948, probate of the will was granted. It

then appears that on 16th October 1948, Mt. Annapurna Devi died, and on 14th December 1948, the appellant filed an application stating that he had come to learn that Nand Kishore Chand had obtained probate with a copy of the will annexe 1 from the Court of the District Judge, as executor, and hence in order to avoid future difficulties he had been advised to make the said Nand Kishore Chand, a party respondent and made a prayer to the effect that the name of Mt. Annapurna Devi be struck off and that the name of Nand Kishore Chand be added as a party respondent to the appeal. It was contended that in the circumstances as the appellant had failed to substitute Nand Kishore Chand, the executor, who was the only legal representative, within the prescribed period, his appeal should be held to have abated, and reliance was placed on the case of *Devji Narayanji v. Ratanshi Hirji* AIR 1937 Pat. 612 : 172 I. C. 741 . In that case the facts were that the suit had been filed by the appellant against three brothers. Before the trial began the Court was informed that the eldest of the three brothers named Keshabji had died and he was accordingly struck out from the suit. The trial Court ultimately dismissed the suit as against remaining two brothers. An appeal was preferred to the District Judge. In the course of the appeal the appellant informed the Court that the younger of the two surviving brothers named Nanji had died and made an application for the substitution of his widow as his heir. The Court ordered that the widow should be substituted. Later, the surviving brother Eatanshi filed a petition to the effect that he was joint with Nanji, that the widow was not the heir and that the real heirs were six surviving members of the joint family, namely, himself, his two minor sons, the two minor sons of the deceased and an adult nephew of the deceased. He claimed, therefore, that the appeal had abated for want of substitution, the period of ninety days having expired. Then the appellant filed an application for setting aside the abatement after substituting the persons named in the petition filed by Ratanshi. The District Judge rejected this application on the ground that the appellant had shown no sufficient cause for failing to substitute the legal heir within the statutory period and, therefore, he held that the appeal had abated as a whole. On a second appeal to this Court it was observed that although there did not appear that the appellant had any motive for applying to substitute a wrong person, but yet it had not been explained either before the District Judge or in this Court what reason he had for doing so. On the facts of that case it was held that the appellant had not acted in a bona fide manner, and, therefore, he could derive no benefit from his application to substitute a wrong person, when he had not shown that he had made any inquiries as to who the real heirs were, On these grounds the finding of the District Judge that the appeal had abated was upheld. Learned counsel for the respondent in the present appeal before us has relied upon this case for his contention that the present appeal should also be held to have abated. As in the case just cited so also in the present appeal before us reliance was placed on the case of *Shib Dutta Singh Vs. Sheikh Karim Bakhsh*, , This case was distinguished: in the case of *Devji Narayanji v. Ratanshi Hirji Bhojraj* AIR 1937 Pat. 612 : 172 I C 741 on the ground, that in the former case the appellant had applied bona fide and within time for the substitution of

two heirs of the deceased respondent in ignorance of the fact that there were other heirs.

2. On behalf of the appellant, it was argued on the authority of the case of Shib Dutta Singh Vs. Sheikh Karim Bakhsh, that the appellant should be held to have made an application for substitution of such of the heirs of the deceased respondent as he bona fide believed to be in existence and that, therefore, the appeal should not abate. The learned Judges, who decided the case of Devji Narayanji v. Ratanshi Hirji Bhojraj A. I. R. 1937 Pat. 613 : 172 I. O. 741 distinguished the case of Shib Dutta Singh Vs. Sheikh Karim Bakhsh, on the ground that while in the latter case the appellant had acted bona fide, in the former case the appellant had not so acted. I am of the opinion that in the appeal before us the action of the appellant was bona fide and, therefore, the decision in the case of Shib Dutta Singh v. Karim Buksh, 4 Pat 320 : AIR 1935 Pat. 651) should govern the present appeal. For, in the appeal before us, on the death of the sole respondent, Ram Babu, the appellant first sought to substitute his widow Mt. Annapurna Devi and also made an application to add Sailendra Kishore the legatee as a party respondent under the guardianship of his father. When thereafter Nand Kishore Chand obtained probate of the will and Mt. Annapurna Devi died, then the appellant filed an application to implead Nand Kishore, the executor, as a party respondent. It is clear that the appellant before us bona fide made his application for substitution of the widow Mt. Annapurna Devi and thereafter another application to add Sailendra Kishore the legatee as a party respondent, though the proper person to be substituted was the sole executor Nand Kishore Chand. It was after Nand Kishore Chand obtained probate of the will and Mt. Annapurna Devi died that the appellant sought to implead Nand Kishore Chand as a party respondent. I have no doubt as to the bona fides of the appellant. Clause (3) of Rule 4 of Order 22, Civil P. C., directs that the appeal shall abate where within the time limited by law no application is made under Sub-rule (1). In the present appeal an application had been made within time for substitution in place of Ram Babu. The appeal, therefore, did not abate as against the deceased respondent. As was held in the case of Shib Dutta Singh Vs. Sheikh Karim Bakhsh, so also in the present appeal I would hold that even if there was abatement, the appellant is entitled upon the facts of the present case to have the abatement set aside and to have the name of Nand Kishore Chand substituted in place of the deceased respondent. In this view of the matter, before the appeal was heard on merits, we ordered that Nand Kishore Chand be added as a party respondent in place of Mt. Annapurna Devi.

3. Before I deal with the appeal on merits, there is another matter to which a reference must first be made. The suit was instituted by the plaintiff as a pauper. The suit was valued at Rs. 4650. It was decreed by the trial Court but dismissed by the lower appellate Court. The plaintiff, accordingly has come up to this Court in second appeal, valuing his memorandum of appeal at Rs. 1494-14 0 and praying that the decree of the trial Court be restored. The plaintiff appellant has paid court-fee on that amount. The Stamp Reporter took exception to the

valuation given by the appellant on the memorandum of his appeal as also to the amount of court-fee paid thereon. According to the Stamp Reporter, the memorandum of appeal should have been valued at the total sum of Rs. 7133 and should have been stamped with the appropriate court-fee on that amount. The Taxing Officer accepted the report of the Stamp Reporter and directed the appellant to correct the valuation to Rs. 7194-14-0 and to make good the deficit court-fee. This the appellant has done. On this valuation the appeal from the judgment and decree of the trial Court lay to this Court and not to the lower appellate Court. But as the appeal had been filed before the lower appellate Court, the lower appellate Court passed its judgment and decree dismissing the suit. In these circumstances, as has been held in the Full Bench case of *Ramdeo Singh v. Raj Narain Singh* A. I. R. 949 Pat. 278, although a judgment rendered by the Court which had jurisdiction on the valuation given, though incorrectly given, is not a complete nullity and is binding on the parties unless set aside. When therefore a second appeal is preferred to the High Court, the appeal cannot automatically be treated as a first appeal. This Court has to examine whether by reason of the lower appellate Court dealing with the matter, the appellant has suffered prejudice. Simply because the lower appellate Court had no jurisdiction over the appeal, which should have been heard as first appeal in the High Court, that would not by itself amount to prejudice in the disposal of the case on merits. The crucial test in disposing of this appeal is whether prejudice has been caused in the disposal of the appeal in the lower appellate Court on its merits. If that test is fulfilled, then the objection as to jurisdiction is entertainable, otherwise the defect of jurisdiction may be ignored.

4. I now come to the merit of the appeal itself. The appellant, who was the plaintiff, is Madhusudan Lal, a resident of Mohalla Chowk, Patna City, and the original respondent, who was the defendant, was Ram Babu (since deceased) of village Hilsa. The appellant's case was that Ram Babu approached him to instal a mill of chanti, flour and oil at Hilsa, his native village, and for this purpose made an offer to him for a plot of land rent-free and free of cost, while the appellant agreed to render such work as "pisai perai" for his domestic purposes free of charges. The appellant having accepted the offer filed an application in the year 1925 to the Director of Industries, Bihar, under the State Aid to Industries Act, 1923, for advancing a sum of money for the purchase of machineries. His application was accepted. Thereafter the appellant constructed a building under the supervision of Government officials on that plot of land which had been given to him by Ram Babu and installed certain machineries which had been obtained through the Government. It was the appellant's case that he had paid all charges in respect of the construction of the building as also for the purchase of the machineries. Sometime at the end of the year 1936 the mill closed down due to loss. The appellant's case then was that Ram Babu suggested to him to purchase a bigger machinery and offered pecuniary help to develop and improve the business provided the management and control of the mill were left to him and the appellant agreed. Accordingly, in the beginning of the year 1937, the

appellant handed over to Ram Babu the entire building together with all the machineries, and Ram Babu agreed to pay him a sum of Rs. 25 per month as rent for the building and Ram Babu had also agreed to render accounts in respect of the machineries and other establishment materials. It is alleged that Ram Babu had also agreed to pay 6 per cent. per annum as interest on the value assessed in respect of the machineries, the value assessed being a sum of Rs. 3550. The appellant then alleged that Ram Babu never paid anything. He also alleged that he had sold some machineries relating to Dal Mill for Rs. 2250 which sum he made over to Ram Babu in order to purchase some bigger machinery. Ram Babu, accordingly should have been in possession and occupation of the building and the premises constructed by the appellant since 1937. But as Ram Babu was unwilling, in spite of the service of notice to him, to give up possession of the building and as he also denied the title of the plaintiff over the building and as he paid no rent since January 1939, to August 1941, the appellant had to bring his suit for (1) a declaration of his title to the building and machineries as detailed in the two schedules attached to his plaint and for recovery of possession by evicting the defendant Ram Babu therefrom; (2) recovery of a sum of Rs. 3550 as the price of the machineries; and (3) for recovery of another sum of Rs. 800 due to him as rent for 82 months, that is, from January 1939, to 31st August 1941, at the rate of Rs. 25 per month.

5. The main defence to the suit was that the defendant Ram Babu had never offered to make a free gift of his plot of land for the construction of the mill but that the plaintiff himself had requested him to give him some land and to advance money for the construction of the building for starting a mill and that the defendant agreed to do so on condition that the plaintiff would construct the building on his land with the money advanced by him (the defendant) and the building would become the property of the defendant while the plaintiff would carry on business of the mill for three years after the completion of the building free of rent and after that period the plaintiff would have to pay rent at the rate of Rs. 20 per month to the defendant. It was also alleged by the defendant that in pursuance of this agreement he advanced an aggregate sum of Rs. 3664 from time to time to the plaintiff for the construction of the building so that the building belonged to him and not to the plaintiff. It was further alleged that in addition to that advance the plaintiff took further loans up to Rs. 1171-13-3 on different occasions for the purpose of carrying on business of the mill thus bringing up the total advances to the sum of Rs. 4835-13-3. The business of the plaintiff, however, failed in 1936 and the plaintiff himself sold certain machineries to different persons and took away some of the moveables. The defendant denied to have agreed to pay a monthly rent of RS. 25 per month for the building, as he had never been in possession of it as a tenant. In these circumstances, the defendant claimed that when the business failed the plaintiff gave khas possession of the building to the defendant in 1937 as this building had been constructed at the cost of the defendant and upon the land of the defendant.

6. As already stated the trial Court decreed the plaintiff's suit holding that the building had been constructed by him and at his own expense. But the plaintiff's claim regarding recovery of arrears of rent was disallowed. The plaintiff was however found entitled to recover a sum of Rs. 1,138 being the price of some machineries, which the defendant had sold to different persons.

7. On appeal to the lower appellate Court by the defendant, the plaintiff's suit was dismissed altogether.

8. The suit being in ejectment, the onus lay upon the plaintiff to prove his title. [His Lordship discussed the evidence and observed that there was no good reason to disturb the conclusions arrived at by the lower appellate Court. His Lordship proceeded :]

9-12. In the view which I have taken the plaintiff cannot complain of any prejudice in the disposal of his appeal in the Court below, and having examined the evidence in the case I am of the opinion that the appeal must fail.

13. The appeal is accordingly dismissed with costs

Reuben, J.

14. I agree.

15. There is no reason to doubt the bona fides of the appellant in the matter of the substitution.

16. On the merits the appellant must fail. The onus of proof is on him and he cannot succeed merely on the weakness of the defence. His story is an improbable one and I do not find it possible to accept it on the evidence adduced, by him in support of it.