

(1969) 12 BOM CK 0012

In the Bombay High Court

Case No : Civil Revision Application No. 261 of 1967

Mahagu Vishwanath Huske

APPELLANT

Vs

Bhagirathibai Shrawan Husko

RESPONDENT

Date of Decision : 16-12-1969

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 3

Citation : (1972) 74 BOMLR 785

Hon'ble Judges : Bhole, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Bhole, J.—This is an application in revision by the surviving plaintiffs and the legal representatives of deceased plaintiffs from an Order passed by the Second Extra Assistant Judge, Nagpur, disallowing the objections of the applicants here, that the appeal had abated because no legal representatives of respondent No. 1 (plaintiff No. 1) were brought on record within the period of limitation. Their prayer was that the appeal had abated in so far as deceased respondent No. 1 was concerned.

2. Four plaintiffs had obtained a decree for possession of a house at Umrer on April 11, 1966 in the Court of the Civil Judge, Umrer. The defendants had filed an appeal against the decree in the District Court on May 5, 1966. The plaintiffs had filed cross-objections against the directions about the future mesne profits. The trial Court had not given any directions as to how the future mesne profit was to be recovered by the decree-holder. Pending the appeal respondent No. 1 (plaintiff No. 1) died leaving seven legal representatives. He died on October 11, 1966. On January 9, 1967, the last day for Substituting the legal representatives, the legal representatives of respondent No. 1 and the other respondents applied for substitution of the names of the legal representatives of respondent No. 1 in the cross-objections filed by the respondents. There was no application for substitution of the legal representatives of respondent No. 1 in so far as the

appeal was concerned. However, the appellants (defendants) applied on January 25, 1967 for substitution of five legal representatives in appeal. The respondents and the legal representatives of respondent No. 1 objected and had contended that the appeal had abated so far as the deceased respondent No. 1 was concerned, because the legal representatives were not brought on record within the period of limitation. This matter was heard by the Second Extra Assistant Judge, Nagpur. According to him, the substitution of the legal representatives of respondent No. 1 in the cross-objections was as good as substitution of the legal representatives in the appeal and, therefore, the substitution in the cross-objections would enure for the benefit of appeal. Accordingly, therefore, he held that the appeal did not abate. This is the Order which is now challenged here by the applicants.

3. The learned advocate for the applicants contends here that the Order passed by the learned Extra Assistant Judge is improper. He invites my attention to Clause (4), of Rule 22 of Order XLI, CPC and says that the substitution of the legal representatives in the cross-objections will not enure for the benefit of appeal. Rule 22 is regarding the cross-objections to a decree by the respondents. Under Sub-rule (4) where in any case, in which any respondent has under this rule filed a memorandum of objection, the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit. The learned advocate for the applicants contends here that this rule clearly shows that the cross-objection could independently exist inspite of the fact that the original appeal was withdrawn. According to him, therefore, the substitution of legal representatives in the cross-objections may keep the cross-objections alive but will not keep the appeal alive. I do not think that the applicants will in any way get help from this rule. Under this rule the withdrawal of an appeal is no bar to the hearing of cross-objections filed by a respondent, whether the appeal is withdrawn before or after the hearing. Similarly the dismissal of an appeal for default is no bar to the hearing of cross-objections. On the other hand, I feel that we will have to decide the point before me on the basis of Order XXII, Rules 3, 4 and 11 thereof.

4. But the learned advocate for the applicants relies on *Abdullamiya v. Mahomedmiya* (1948) 51 Bom. L.R. 241 : A.I.R.[1949] Bom. 276 and *Mst. Bakhtawari Vs. Sadhu Singh and Others*, and argues on the basis of the propositions laid down in these two cases that the Order of the learned Assistant Judge is illegal. In *Abdullamiya v. Mahomedmiya*, the appeal had abated as the appellant died and the legal representatives were not brought on record within the time prescribed by law of limitation. The respondent had filed cross-objections to the appeal and it was contended that although the appeal had abated, the respondent had a right to have his cross-objections heard, since he had brought the heirs of the appellant on record for the purposes of the cross-objections. The learned Judges in that case considered Section 526, CPC (under the old Code) which contained the corresponding provisions as in Order XLI, Rule

22, Sub-rule (4). His Lordship Chief Justice Chagla observed in that short judgment that, under Sub-rule (4) when an appeal was withdrawn or was dismissed, the cross-objections may nevertheless be heard and that, therefore, the original rigour of the law (as provided in the old Code of 1882 in Section 561) had been relaxed but it had been relaxed, only to this extent, viz. in the two cases laid down in Sub-rule (4), of Rule 22 of Order XLI, Civil Procedure Code. These two cases were : (1) where the appeal was withdrawn, and (2) where the appeal was dismissed. It was observed that there was no provision in this rule for a case of an abatement of an appeal. Therefore, it was observed that the Legislature did not intend that cross-objections should be heard when the appeal had abated. Under the circumstances, as that case was not a case of withdrawal of an appeal or a dismissal of an appeal, but was a case of an abatement of an appeal, the respondents there were found to have no right to have their cross-objections heard. Therefore, the question whether an appeal would abate or would not abate because of the substitution of legal representatives in the cross-objections did not pointedly arise in that case at all. The appeal there was taken to have abated as the appellant had died and as the legal representatives were not brought on record and in that background, a question arose as to whether the cross-objections could be heard or could not be heard. The point which has arisen in the application before me was not there before his Lordship in that case. That also appears to be the case in *Bakhtawari v. Sadhu Singh*. The Punjab High Court relied upon *Abdullamiya v. Mahomedmiya* and found that the cross-objection could not be heard if the appeal had, in absence of legal representatives on record, abated.

5. Similar facts and circumstances arose also in *Arjun Singh and Others Vs. Matukdhari Singh and Others*, and *Gobinda Prosad Dawn and Another Vs. Rajani Kanta Dawn and Another*, , and in the context of the facts and circumstances of those cases, the Patna High Court as well as the Calcutta High Court decided that where the appeal has abated as the legal representatives of the deceased respondent were not brought on record, the cross-objector has no right to have his cross-objections heard.

6. The learned Extra Assistant Judge relied on Note No. 87 of the 1951 Nagpur Law Journal (1950) S.A. No. 514 of 1945 at p. 34 of Notes of Cases, and *Hukam Chand and Others Vs. Laxmi Narain and Others*, , to get support for his Order. Of course, Note No. 87 does not give the details of the case, that is S.A. No. 514 of 1945, decided on October 25, 1950 by Mudholkar J. of the old Nagpur High Court. A point as to whether an application by the deceased respondent's legal representatives for substitution in the cross-objection would enure for the benefit of the appellant and the appeal would not abate, arose there. The Nagpur High Court observed that if on the death of the respondent who had filed a cross-objection, his legal representatives apply for being brought on record so far as the cross-objection is concerned, the application enures for the benefit of the appellant and the appeal does not abate even if there was no application by the appellant. I may here refer to 22 CWN 169 (Privy Council) for guidance. Their

Lordships of the Privy Council were also considering the abatement of the suit there in the background of substitution of party on an appeal as to interlocutory Order. During the course of the judgment their Lordships laid down a healthy principle which would guide us in the matter of deciding the question of abatement. They laid down a proposition that a substitution of a new plaintiff or defendant for one stage of a suit, for instance upon an appeal as to an interlocutory matter, is effective for all future stages of the suit. In other words, the principle is that if the legal representatives are brought on record within the prescribed time at one stage of the suit, it will enure for the benefit of all the subsequent stages of the suit. This healthy principle was followed by the Rajasthan High Court in *Hukam Chand v. Laxmi Narain*. This High Court was considering an application by heirs of a deceased respondent in cross-objections. There was, however, an omission to bring them on record in appeal. The effect of the application in cross-objections was being considered. Following the rule laid down in the above cited Privy Council case, that High Court held that the omission by the appellant to bring on record the legal representative of a deceased respondent would not cause the abatement of the appeal because the effect of the legal representative being added in the cross-objections was, in effect, to make him a party to the appeal, the appeal and the cross-objection being not disconnected and independent proceedings, but part of the same proceedings. The Rajasthan High Court had also cited *Kanthimathi v. Perumal* A.I.R.[1925] Mad. 777 to support this proposition. They also relied, to some extent, on a Full Bench case in *Labhu Ram v. Ram Partap* A.I.R.[1944] Lah. 76. Therefore, the principle as laid down in the Privy Council case can very well be applied to the facts and circumstances of our case. The cross-objections are filed in the appeal. If the heirs of deceased respondent No. 1 are brought on record, they can automatically be said to have been brought on record, both for the purposes of the cross-objection and the appeal.

7. I might also cite here another case and that is *Rangubai Shankar v. Sunderabai* (1965) 68 Bom. L.R. 26. wherein the principle recognized by the Judicial Committee in the case cited above i.e. *Brij Indar Singh v. Kanshi Ram*, was discussed. The Supreme Court in *Rangubai's* case observed (p. 30):

...A combined reading of Order XXII, Rules 3, 4 and 11, of the CPC shows that the doctrine of abatement applies equally to a suit as well as to an appeal. In the application of the said Rules 3 and 4 to an appeal, instead of "plaintiff" and "defendant", "appellant" and "respondent" have to be read in those rules. Prima facie, therefore, if a respondent dies and his legal representatives are not brought on record within the prescribed time, the appeal abates as against the respondent under Rule 4, read with Rule 11, of Order XXII of the Code of Civil Procedure.

But the Supreme Court observed that there is yet another principle recognized by the Judicial Committee in *Brij Indar Singh v. Kanshi Ram* which softens the rigour of this rule. The said principle is that if the legal representatives are brought on

record within the prescribed time at one stage of the suit it will enure for the benefit of all the subsequent stages of the suit. The Supreme Court then illustrated the principle by giving three instances. In all the three illustrations, one fact was common, viz., the Order bringing on record the legal representatives was made at one stage of the suit, be it in the suit or in an appeal against the interlocutory Order or final Order made in the suit, for an appeal is only a continuation of the suit. The Supreme Court observed as follows (p. 30):

...Whether the appellate Order confirms that of the first Court, modifies or reverses it, it replaces or substitutes the Order appealed against. It takes its place in the suit and becomes a part of it. It is as it were the suit was brought to the appellate Court at one stage and the Orders made therein were made in the suit itself. Therefore, that Order enures for the subsequent stages of the suit.

8. It appears to me, therefore, that if the legal representatives were brought on record within the period prescribed by limitation in the cross-objections, that substitution will enure for the benefit of the appeal. A cross-objection is nothing but a part of an appeal. After the appeal is filed, any respondent, though he may not have appealed from any part of the decree, may not only support the decree on any of the grounds decided against him in the Courts below, but take any cross-objection to the decree which he could have taken by way of an appeal, provided he had filed such objection in the appellate Court within one month from the date of service of the appeal notice on him. It is now a well-known fact that the appeal is nothing but a continuation of a suit. A suit is decided on the issues framed on the basis of pleadings. After a decree is passed, a party who is aggrieved by the decree, appeals. But after the appeal is filed, a respondent can also file such objections at the appellate stage against the findings of some issues by the trial Court. Therefore, when the appeal is heard, the objections to some issues in appeal and cross-objections to other issues are heard. The whole of the appeal is heard this way and decided. Whatever may be the Order passed in appeal and cross-objections, it substitutes the Order appealed and cross-objected against. It takes its place in suit and becomes its decree. Therefore, the Order bringing on record the legal representatives in cross-objections is as good an Order as in a suit or continuation of suit. In this view, therefore, the Order in cross-objection will enure for the benefit of the appeal. Therefore, the Order passed by the learned Extra Assistant Judge is quite legal and proper.

9. This application, therefore, will fail. I, therefore, dismiss this application. In view of the circumstances of this case, the parties to bear their own costs.