

(1975) 06 KAR CK 0003
In the Karnataka High Court

Mangalabai and Others

APPELLANT

Vs

Sayyad Fakir and Others

RESPONDENT

Date of Decision : 03-06-1975

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 43 Rule 1K, 100

Citation : AIR 1976 Kar 136 : (1975) 2 KarLJ 140

Hon'ble Judges : K. Jagannatha Shetty, J

Bench : Single Bench

Advocate : B.V. Krishnaswamy Rao, for the Appellant; V. Tarakaram and T.S. Ramachandra, for the Respondent

Judgement

1. This appeal preferred under Order 43, Rule 1 (k) of the CPC arises out of an the Civil Judge, Karwar Applications Nos. 1 to IV No. 571 of 1965 holding has abated consequent on the failure of the appellants to bring on record the legal representatives of one of the respondents therein.

2. The facts leading up to the appeal are these:

Sayyad Hanif Shah and his wife Imambu executed two mortgage deeds in respect of certain property on 28th February, 1882 and 25th January, 1883. They died before redeeming the mortgages. The dispute arose among the persons claiming to be the legal heirs of the mortgagors as to who should redeem the mortgages. A suit for declaration was instituted in the Munsiff's Court, Haliyal stating that the plaintiffs together with defendants 5 to 7 are the heirs entitled to redeem the mortgages, The appellants before me resisted the said suit contending, inter alia, that the plaintiffs are not the heirs of the mortgagors, The trial court decreed the suit declaring that the plaintiffs alone are the heirs entitled to redeem the mortgages. Aggrieved by the decree, defendants 1 to 4 preferred an appeal in the Court of the Civil Judge, North Kanara. During the pendency of the appeal, respondents 3 and 6 therein (that is plaintiff-3 and defendant-5) died. The applications to bring their legal representatives were filed by the appellants therein after one year from the date of death of the said

respondents. The appellate court refused to condone the delay on the ground that the cause shown by the appellants was not sufficient. The result was disastrous. The Court dismissed the applications and held that the appeal against the deceased respondents abated. It further held that if the appeal against the remaining respondents was allowed, it would lead to inconsistent and contradictory judgments in respect of the same subject-matter in the suit and so the entire appeal has abated.

3. Some of the defendants challenging the correctness of the appellate order, have preferred the Miscellaneous Second Appeal to this Court.

4. This Court while registering the appeal, has kept open the question of its maintainability to be decided at the time of final hearing. So, it is now necessary for me to decide that question before proceeding to consider the merits of the appeal.

5. For the respondents, it was urged that the Miscellaneous appeal is not maintainable. According to them, a Regular Second Appeal ought to have been preferred u/s 100 of the CPC as the lower appellate Court has dismissed the entire appeal on the ground that it has abated.

6. The question raised turns on the scope of Section 100 of the CPC which so far as it is relevant provides:

""100. (1) Save where otherwise expressly provided in the body of the Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court, on any of the following grounds, namely: -

....."

It is seen from the above provisions that a Regular Second Appeal lies from every decree passed in appeal by any Court. The question is whether the appellate Court dismissing the appeal on the ground that it has abated, or to put it properly that the appeal stands abated, amounts to a "decree passed in the appeal" as provided by Section 100 of the Code of Civil Procedure. If it was a decree made "in the appeal", the objection raised is tenable and the appellants ought to have preferred a Second Appeal; if it was not, the Miscellaneous Appeal should be held to be maintainable.

7. It seems to me that there is considerable difficulty in accepting the preliminary objection. The meaning of the expression "passed in appeal" was the subject-matter of several decisions of different High Courts. The line of authorities is to the effect that the appeal should be dealt with judicially and thereafter a judgment should be delivered. Mere dismissing the appeal for want of prosecution or on any other technical ground cannot be construed as an order of "decree passed in appeal", or "decision on appeal". This line of reasoning has been approved by the recent decision of the Supreme Court in *Smt. S. Kalawati Vs. Durga Prasad and Another*, wherein Alagiriswami, J., speaking for the Court

observed:

"The principle behind the majority of the decisions is thus to the effect with where an appeal is dismissed on the preliminary ground that it was not competent or for non-prosecution or for any other reason the appeal is not entertained, the decision cannot be said to be a "decision on appeal" nor of affirmance. It is only where the appeal is heard and the judgment delivered thereafter the judgment can be said to be a judgment of affirmance."

In my view, the above principles are clearly applicable to the facts of the present case. The lower appellate court did not consider the merits of the questions involved in the appeal. It said that the appeal against the deceased respondents stood abated and consequently, the entire appeal abated since in the event of the appeal being allowed as against the remaining respondents there would be two contradictory decrees in the same litigation with respect to the same subject matter. It was only with this technical ground that the appellants were prevented from prosecuting the appeal or the appeal was not entertained. In such case, the decision made thereon cannot be said to be "decision on appeal" or "decree made in appeal" as it is clear from the decision of the Supreme Court in Kalawati's case. I therefore hold that the Miscellaneous Appeal is maintainable.

8. I shall now turn to the main contention urged for the appellants. It was urged that the lower appellate Court was in error in holding that the decree under appeal therein was a joint decree and in the event of the appeal being allowed as against the surviving respondents, it would lead to contradictory decrees in the same litigation. It is true that the decree against the deceased respondents has become final due to the omission on the part of the appellants to implead the legal representatives of the deceased within the time allowed by law or not showing sufficient cause for the delay to bring them on record. The decision of the appellate court stating that the entire appeal has abated would be justified if the decree of the trial court was one and indivisible as against all the contesting defendants.

9. But the position appears to be otherwise in the present case, It seems to me that having regard to the relief claimed in the suit, and the decree passed thereon, it would be difficult to hold that the declaratory decree made by the trial Court was a joint decree. The plaintiffs filed a suit for a declaratory decree that they along with defendants 5 to 7 are the legal heirs of the original mortgagors entitled to redeem the mortgages. The contesting defendants resisted the suit pointing out that neither the plaintiffs nor defendants 5 to 7 are the legal heirs of the deceased mortgagors. The trial court, however, made a decree declaring that the plaintiffs alone are legal heirs of the original mortgagors. The declaration made was in essence related to the status of the plaintiffs regarding their relations with the original mortgagors. Let us take it that the declaration made by the trial court in favour of one of the plaintiffs became final and binding on the defendants, since his legal representatives were not brought on record. What follows therefrom was that there was no appeal as against that decree-holder.

But the appellants before the lower appellate court could still contend that the remaining decree-holders are not related to the original mortgagors and therefore not their legal representatives. The parties to the suit being Mohammedans, succeed to the estate of the deceased as tenants-in-common. Therefore, the appeal could be pressed against the remaining respondents. ultimately the said appeal were allowed, it would be declared that the remaining respondents are not-legal heirs of the original mortgagors. This, in my opinion, would not lead to two inconsistent decrees in respect of the same subject-matter of the litigation. The appellate court, therefore, was in error in holding that the entire appeal has abated consequent on the failure of the appellants in not bringing the legal representatives of the deceased respondents 3 and 6 on record.

10. The next question relates to the correctness of the finding given by the appellate court on the cause shown by the appellants in explaining the delay to bring the legal representatives of the deceased respondents. The affidavit in support of the application filed therein stated that the deponent had no knowledge about the death of the respondents. One of the appellants has been examined in support of those averments. He has admitted that the application was filed after about one year of the information from their lawyer about the death of respondent-3. That statement has not been explained in his re-examination. The said statement itself is sufficient to negative the claim of the appellants that they were not aware of the death of respondent-3. Having regard to these circumstances, I am entirely in agreement with the conclusion reached by the appellate court that the appellants were careless in not filing the application in time.

11. In the result, the appeal is allowed. The order under appeal is set aside with a direction to the appellate court to restore the appeal an file and dispose of the same as against the remaining respondents, in accordance with law.

12. In the circumstances, I make no order as to costs.

13. Appeal allowed.