

(1926) 03 CAL CK 0019
In the Calcutta High Court

Midnapore Zamindary Co., Ltd.

APPELLANT

Vs

Amulya Nath Roy Chowdhury and Others

RESPONDENT

Date of Decision : 19-03-1926

Acts Referred:

Citation : AIR 1926 Cal 893

Hon'ble Judges : Page, J;Cuming, J

Bench : Full Bench

Judgement

Cuming, J.—In the suits out of which these two appeals Nos. 249 and 250, have arisen the plaintiffs, who were some three in number, sued the defendants, the Midnapore Zemindari Co., for a declaration of their lakheraj title and for recovery of possession of the disputed lands on the ground that these lands in suit appertain to a certain nishkar mahal which they held and that they had been dispossessed by the defendant company who have included some plots of their lakheraj lands in the rent lands which the plaintiffs held under the defendants. The defendants had sued them for rent, both of the rent land and the lakheraj land, and so dispossessed them; they therefore sue for declaration of their title and recovery of possession. The defendant company contested the suit and their case was that the record-of-rights was in their favour; the plaintiffs had no lakheraj title to the lands in suit and the case was barred by limitation.

2. The trial Court decided, all the issues against the plaintiffs and found among other findings that the suits were barred by limitation. On appeal the judgment of the trial Court was reversed and the learned Subordinate Judge ordered that the suit be decreed, the plaintiffs' lakheraj right to the lands in suit be declared, that they be confirmed in, and do get possession of, the same and that they do get their costs from the defendants. The defendant company preferred appeals to this Court and on the appeals being called on a preliminary objection was raised by the learned advocate for the respondents so far as concerns the Appeal No. 250. The contention of the learned advocate is that as one of the respondents in this appeal died during the pendency of the appeal, the appeal so

far as he was concerned abated. The appellants applied to set aside the abatement and this application was rejected by this Court. He then contends that the suit was one for joint possession by the plaintiffs and that the present appeal is incompetent in the absence of one of the respondents. In support of his contention he refers to the case of Manindra Chandra Nandi Vs. Bhagabati Devi Chowdurani and Others, . The facts of that case are practically indistinguishable from the facts of the present case.

3. The learned Counsel who has appeared for the appellants contends that the suit has abated only against one of the respondents and that it can proceed against the other respondents and has not abated against them also. No doubt in view of Order 22, Rule 4, Code of Civil Procedure, it, cannot be said that the case has abated as against the remaining respondents. But that is not the point. The point is whether the appeal can proceed in the absence of the dead respondent without the substitution of his heirs. The suit is by a number of co-sharers and their shares were not defined in the plaint. They sued for joint possession and have obtained a decree for joint possession from the lower appellate Court. Supposing for the sake of argument that the appeal succeeds, and we make a decree in favour of the appellants setting aside the decree of the lower appellate Court so far as concerns the respondents on the record, such a decree would be incapable of execution, because the decree in favour of the heirs of the dead respondent has not been set aside and under that decree he should be entitled to possession. If therefore in such a case we make a decree in favour of the appellants as against the respondents who are on the record there will be two conflicting decrees in existence. Therefore clearly, the appeal cannot proceed in the absence of the heirs of the dead respondent and is therefore incompetent. The Appeal No. 250 is, therefore, dismissed with costs.

Page, J.

4. I agree that each of these appeals should be dismissed. I desire, however, to add a few observations with regard to Appeal No. 250. In that case the lower appellate Court has found that the plaintiffs are three co-owners of certain lakheraj lands. The defendants-appellants contend that the lands are held by the plaintiffs as tenants under them. One of the plaintiffs-respondents has died pending the appeal to this Court and inasmuch as his legal representatives were not substituted in due time, and an application for leave to substitute his representative was rejected, the appeal as against that plaintiff has abated. The result is that in respect of one of the three co-owners of this lakheraj land the decree of the lower Court stands. The defendants contend, notwithstanding the abatement of the appeal as against the deceased co-plaintiff, that they are entitled to proceed with the appeal as against the other two co-plaintiffs who have duly been made respondents. The learned advocate on behalf of the appellants based his contention upon the terms of Order 22, Rule 4(3) which provides that:

where within the time limited by law no application is made under Rule 1 the suit

shall abate as against the deceased defendant.

5. This Rule applies alike to a defendant and to a respondent (O. 22, Rule 11). The learned Advocate contends that on a true construction of Sub-rule 3 in circumstances such as those obtaining in these proceedings the appeal abates only as against the deceased respondent. He pointed out that the words as against the deceased defendant" were not contained in the corresponding Section 368 of the Code of 1882.

6. In my opinion, that is not the meaning and effect of this sub-rule. Whether or not the appeal abates as against the deceased respondent only or, as a whole, must depend upon the particular circumstances of each case the test to be applied being whether, in the absence of the respondent against whom the appeal has abated, the appeal can proceed: *Raj Chunder Sen v. Gangadas Seal* [1907] 31 Cal. 487. Now, if the appellants were to succeed in this appeal as against the two respondents on the record the result would be that whereas the lands in suit must be taken under the decree of the lower Subordinate Court to be lakheraj lands belonging to the co-owners in so far as the deceased plaintiff was concerned, under the decree of the High Court the lands would be held not to be lakheraj lands as against the other two co-owners who failed in the appeal. The creation of a situation so strange and anomalous ought not to be permitted, and in circumstances, such as those which prevail in this case, I am of opinion that the appeal cannot proceed in the absence of the representatives of the deceased plaintiff-respondent: see *Kali Dayal Bhattacharya v. Nagendra Nath Pakrashi* [1920] 30 Cri.L.J. 217; *Manindra Chandra Nandi Vs. Bhagabati Devi Chowdurani and Others*, . The learned advocate for the appellants further contended that if the appeal was not competent unless the legal representatives of the deceased plaintiff were on the record, the Court was entitled and, in the circumstances, ought, to add the legal representative of the deceased plaintiff as a respondent under Order 41, Rule 22.

7. Whether in any particular case the Court will add or refuse to add a party to an appeal under Order 41, Rule 22, is a matter which is left to the discretion of the Court. In this case I am of opinion that the Court would not be justified in exercising its discretion under Order 41 Rule 22, in favour of the appellants for this among other sufficient reasons that, if the Court were to allow the appellant to add the representative of the deceased plaintiff as a party to the appeal the Court would be acting in a manner wholly inconsistent with its own previous order by which the application of the appellants for the substitution of the representative of the deceased plaintiff as a respondent was rejected upon the ground that the appellants had neglected to apply for substitution within the time provided in that behalf, and had not been able to satisfy the Court that there was any sufficient ground for an extension of time being granted [see the observations of Mookerjee and Panton JJ. in *Kali Dayal* case [1920] 30 Cri.L.J. 217]. Is these circumstances, in my opinion, both the appeals must be dismissed.