

(1970) 03 RAJ CK 0004

In the Rajasthan High Court

Case No : Civil Second Appeal No. 261 of 1966

Motilal and Others

APPELLANT

Vs

The State of Rajasthan and Others

RESPONDENT

Date of Decision : 27-03-1970

Acts Referred:

Citation : (1970) WLN 195

Hon'ble Judges : C.M. Lodha, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

C.M. Lodha, J.—This is the plaintiffs second appeal from the judgment of the learned Senior Civil Judge No. 2, Jaipur City dated 15-2-66 by which the plaintiff's appeal was dismissed- as having abated as a whole.

2. The plaintiff's filed the suit out of which this appeal arises on 4-6-1960 in the Court of Munsiff West, Jaipur praying that a declaration may be granted that the State of Rajasthan and the Urban Improvement Board, Jaipur (defendants Nos. 1 and 2) had no right to demarcate, allot and/or sell the plots in question, situated towards the south of the plaintiff's plot on Kacha Banda Road in Bani Park, and that the allotment and sale of the plots made to defendants Nos.3 to 9 be declared void and these defendants Nos. 3 to a further be restrained by a perpetual injunction from making construction on the plots Nos.H.7/to H.77 allotted or sold to them. The suit was opposed by all the defendants except the defendants Nos.7 and 9.

3. After recording the evidence produced by the parties the learned Munsiff dismissed the suit.

4. Aggrieved by the judgment and decree of the learned Munsiff the plaintiff's filed appeal in the Court of the District Judge, Jaipur which came up for disposal before the Senior Civil Judge No.2 Jaipur City.

5. It appears that on 17-8-1965 the respondents Nos.3 and 4 Sarv Shri Tejnarain and Anandnarain made an application before the lower appellate court that the respondent No.7 in the memo of appeal had died 4 or 5 years ago, and the appellants had made no effort to bring his legal representatives on the record. It was, therefore, prayed that the appeal may be dismissed as having abated. The plaintiff-appellants filed a reply to this application on 6-11-1965 and admitted that Nathuram had expired but it was not known as to when he died. They also arrested that Nathu Ram had died issueless heirless before the institution of the suit itself, and therefore, no question of abatement arose. None of the parties, however, filed any affidavit or any other evidence in support of their respective allegations. The learned Senior Civil Judge has, however, come to the conclusion that Nathuram was alive after the institution of the suit and had put in appearance in the trial court as evidenced by the order sheet or that court dated 8.3.1961. The notice of the appeal dated 26-12-1964 issued to the respondent No.7 Nathuram was received with a report that Nathuram had died 4 or 5 years ago. In the order sheet of the lower appellate court dated 4-1-1965 this fact was recorded but even thereafter the plaintiff appellants did not take any steps for bringing Nathuram's legal representatives on record. In these circumstances the learned lower appellate court came to the conclusion that the appeal against the deceased respondent Nathuram had abated. He also found that the appeal could not be heard on merits against the surviving respondents as in case the appeal succeeded there would be a conflicting decree. In this view of the matter he dismissed the whole appeal as having abated. Consequently the plaintiffs have come in second appeal to this Court.

6. There is undoubtedly nothing on the record to show as to when Nathuram died. None of the parties even cared to put in an affidavit in this connection before the lower court. Even in the application filed by the respondents Nos.3 and 4 it has not been mentioned as to who are the legal representatives of the deceased respondent Nathuram. Mr. Tikku, learned counsel for the respondents relied upon the report by the Nazir on the notice issued by the trial court regarding temporary injunction in which it is stated by the Nazir that Nathuram was not found and the notice had been handed over to his son Bhanwar Singh. This report in my opinion cannot constitute any evidence that Nathuram had left behind any heirs. Similarly there is absolutely no evidence on the record to show as to when Nathuram died. In the order sheet of the trial court dated 17-9-1960 the presence of respondents Nos. 6 and 7 has been mentioned. Nathuram was no doubt defendant No. 7 in the case. This order sheet has been signed in margin by the two respondents Kailash Bahadur and Govind Sahay Pareekh. Admittedly it does not bear the signature of defendant No.7 Nathuram. Learned counsel for the appellant urged that the defendant No.7 has been mentioned by mistake in the order sheet dated 17.9.1960, As a matter of fact the respondent No.6 Kailash Bahadur and respondent No. 8 Govind Sahay Pareekh were present. There may be some thing in what the learned counsel for the appellant says. But nothing can be said conclusively. In these circumstances I called upon the

learned counsel for the appellants to file an affidavit in this Court as to when Nathuram died and whether he had left behind any heirs. He has filed the affidavit of Ghanshyamdas-appellant wherein it has been stated that he has no personal knowledge as to when Nathuram had died, but he has placed on record a certified copy of an entry from the death register maintained by the Municipal Council, Jaipur dated 28-5-1959, in which it is mentioned that one Nathuram son of Motilal, aged 80 years by caste Kumawat died on 27-5-1959. It is, however, remarkable that even in the affidavit filed in this Court the appellant has conveniently omitted to mention that Nathuram, mentioned in the death certificate produced with the affidavit is the same person was impleaded as defendant No.7 in the suit. It may also be pointed out that in the plaint neither Nathuram's father's name nor his caste, nor his age have been mentioned, and therefore, there is nothing to connect Nathuram, who was impleaded as defendant No.7 in the suit with Nathuram, who is mentioned to have died on 27-5-1959 in the death register maintained by the Municipal Council, Jaipur. The appellants have, therefore, failed in spite of an opportunity having been given by this Court to show that Nathuram, who had been impleaded in the suit by them as defendant No. 7 was already dead on the date of the institution of the suit. No doubt the definite date of Nathuram's death is not known, but the plaintiff-appellants having impleaded him as defendant in the suit, are bound to show that his name had been wrongly mentioned in the array of defendants even though he had died prior to the institution of the suit. It would, therefore, be reasonable to infer that Nathuram has died after the institution of the suit; The question whether he died during the pendency of the suit or thereafter during the pendency of the appeal is also not known. It would, therefore, be proper to examine the correctness of the order of the lower court from both points of view and after having bestowed my careful consideration on the case I have come to the conclusion that it would not make any difference in either case, and the appeal would have to be dismissed, as being not maintainable.

7. Let us assume that Nathuram died during the pendency of the suit and his legal representatives were not brought on the record. The result would be that the decree passed qua Nathuram would be ineffective. So also assuming that Nathuram died during the pendency of the appeal, the decree passed qua Nathuram would be final as his legal representatives have not been brought on the record. At this stage I may mention that it is not now open for dispute that Nathuram had left behind legal heirs and in the affidavit filed by Ghanshyamdas in this Court it is admitted that he had left behind two sons Bhauwarpal Singh and Ganeshwar Singh, and according to the affidavit filed by the respondent Anand Narain he had left behind besides these two sons a few other legal representatives also. Be that as it may, the fact remains that Nathuram had left behind legal representatives who could be impleaded as respondents in the appeal. Thus the position would be that if the appeal filed before the lower court were allowed the suit would result in a decree against all the defendants except Nathuram.

8. It would be relevant at this stage to examine the nature of the suit filed by the appellants and the reliefs claimed by them. It appears that the plaintiff's purchased a plot of land situated in Bani Park, Jaipur from the former Government of Jaipur on 12-6-1944. The plaintiff's case is that the former Government of Jaipur gave them an assurance that the land lying towards the south of the plot sold to them would be kept open, but contrary to the assurance and undertaking by the Government the open land lying towards the south of the plaintiffs plot was divided into 7 plots marked H.71 to H. 77, which were sold to defendant's Nos.3 to 9 of whom Nathuram is admittedly one. The plaintiffs prayed that it may be declared that the State of Rajasthan and the Urban Improvement Board, Jaipur had no right to divide, allot and/or sell the open space referred to above towards the south of the plaintiff's plot, and that the allotments and sales in favour of the defendants Nos 3 to 9 be declared void and the said defendants be restrained by a permanent injunction from raising construction on plots H.71 to 77. The trial court dismissed the plaintiff's suit and has thereby held that the plaintiff's are not entitled to get any declaration that the allotment or sale made by the State of Rajasthan in favour of defendants Nos.3 to 9 is void. It may be relevant here also to point out that the plot allotted and/or sold to Nathuram is plot No H 75. Now if the decree of the trial court were reversed by the first appellate court the result would be that there would be conflicting decrees as there would be no declaration of the sale being invalid against Nathuram, whereas there would be such a declaration qua the sales made to other defendants. A bare perusal of the plaint would show that a relief has been claimed against all the defendants jointly. No doubt separate plots of land have been sold to defendants Nos.3 to 9, but the relief has been claimed jointly against them. In this view of the matter, I am persuaded to come to the conclusion that the appeal could not be maintained against the rest of the defendants without impleading the legal representatives of Nathuram.

9. Incidentally I may also state that the result would not be different even if it is assumed for the sake of argument that Nathuram had died before the institution of the suit. In that case it can very well be argued on behalf of the defendants that the suit could not have been maintained without impleading the legal representatives of Nathuram. But no contingency admittedly arose for raising such an objection because the plaintiff's themselves had impleaded Nathuram as defendant in the suit, and it was not open to them to use without there being any substantial proof in their possession that Nathuram as a matter of fact had died before the institution of the suit.

10. Looked at from any angle there is no escape from the conclusion that the order of the dismissal of the appeal by the first appellate court as having abated or as having not been properly constituted is correct and cannot be interfered with by this Court.

11. Accordingly I dismiss this appeal, but without any order as to costs.