

(1981) 03 AHC CK 0027

In the Allahabad High Court

Case No : Second Appeal No's. 168, 169 and 170 of 1979

Munney Khan

APPELLANT

Vs

Smt. Kaushilya Devi and Others

RESPONDENT

Date of Decision : 06-03-1981

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 3, 100, 2(2)
Limitation Act, 1963 — Article 120

Citation : AIR 1981 All 240

Hon'ble Judges : Deoki Nandan, J

Bench : Single Bench

Advocate : V.K. Barman, for the Appellant; K.B.L. Guar, D.P. Singh, Jagdish Pd. and N. Choudhary, for the Respondent

Final Decision : Dismissed

Judgement

Deoki Nandan, J.—These three second appeals are directed against a common order dated 30th November. 1978 of the court of District Judge, Etah. holding that the three appeals Nos. 10 of 1974. 208 of 1973 and 272 of 1973 had abated on account of the non-impleadment of the legal representatives of the deceased plaintiff- respondents.

2. The first thing which struck me as rather extraordinary in these appeals is that the two deceased plaintiff-respondents Smt. Kaushilya Devi and Smt. Har Peari Devi were originally impleaded as the two plaintiff-respondents in the three second appeals filed in this Court and it was only at the time of the hearing under Order 41 Rule 11 of the CPC that the name of Smt. Kanti Devi. the third respondent was added and the Court directed issue of notice to her alone.

3. Before dealing with the merits of the same as put forth by Mr. V. K. Barman, for the defendant-appellant, it appears necessary to deal with the preliminary objection raised by Mr. K. B. L. Gaur. who had moved an application in this Court on behalf of Bhagwat Saran and Rishi Kumar, who claimed to be the legal representatives of Smt. Har Peari Devi, deceased plaintiff-respondent No. 2. He

contended that the impugned order did not amount to a decree and the three second appeals filed in this Court were incompetent. I have also heard Mr. Jagdish Prasad, on behalf of the third respondent Smt. Kanti Devi. who was impleaded as the third respondent with the permission of this Court at the hearing of the appeal under Order 41 Rule 11 of the Code of Civil Procedure. I may in this context observe that a perusal of the order dated 7th February, 1980. of this Court on Civil Misc. Application No. 277 of 1980 shows that it was contended before the learned Judge who had heard that application that the applicants Bhaewat Saran and Rishi Kumar had been ad-judged as decree-holders. The learned Judge left the question for consideration at the final hearing. Mr. Jagdish Prasad. learned counsel for the third respondent, contended that she the third respondent had been substituted as the legal representative of the plaintiff decree-holders in the execution proceedings. I accordingly permitted both Mr. Jagdish Prasad and Mr. K. B. L. Gaur to participate in the hearing.

4. Before deciding the preliminary objection raised by Mr. Gaur, it appears necessary to state the relevant facts.

5. Three suits for possession by the ejectment of the defendants and for rent and damages etc, were filed by the deceased plaintiff-respondents Smt. Kaushilya Devi and Smt. Har Peari Devi. Suit No. 22 of 1969 of the court of Munsif Kaseani which has given rise to Second Appeal No. 168 of 1979 was decreed by the trial court on 21st July, 1973 for possession and recovery of certain amount as damages. Suit No. 21 of 1969 which has given rise to second appeal No. 169 of 1979 was also filed by the deceased plaintiff-respondents Smt. Kaushilya Devi and Smt. Har Peari Devi and was decreed by the trial court on 22nd Nov. 1973. for the defendant's ejectment and recovery of certain amount as damages. Suit No. 108 of 1969 giving rise to second Appeal No. 170 of 1979 was also filed by the deceased plaintiff-respondents Smt. Kaushilya Devi and Smt. Har Peari Devi and was decreed by the trial court on 5th September, 1973 for possession over the land and for damages. Three appeals were filed in the District Court Etah against the three decrees in the three suits respectively, namely. Civil Appeal No. 10 of 1974, Civil Appeal No. 208 of 1973 and Civil Appeal No. 272 of 1973. During the pendency of these three appeals in the District Court, the first plaintiff-respondent Smt. Kaushilya Devi died on 6th June, 1977. But it appears that before her death, the lower appellate court had by its order dated 22nd March. 1977. remitted issues Nos. 8 and 9 newly framed by it. to the trial court in Civil Appeal No. 272 of 1973 arising from suit No. 108 of 1969 for finding and the record of that suit was in the trial court when Smt. Kaushilya Devi died. Similarly in the other two appeals before the District Court, namely. Civil Appeals Nos. 208 of 1973 and 10 of 1974. an order appears to have been passed that they may be taken up for hearing along with Civil Appeal No. 272 of 1973 after the receipt of the finding of the trial court on issues Nos. 8 and 9 and all the three appeals remained pending in the lower appellate court awaiting the return of the finding by the trial court on issues Nos. 8 and 9, when Smt. Kaushilya Devi died. An application (98-A) was moved on 12th July. 1977 in Suit No. 108 of

1969 in the trial court by Smt. Har Peari Devi. the second plaintiff, stating that Smt. Kaushilya Devi had died on 6th June, 1977 and that she alone was entitled to the property in suit as the survivor after the death of Smt. Kaushilya Devi in accordance with a registered agreement dated 20th January. 1944 and that, therefore, the name of Smt. Kaushilya Devi may be struck off. This was followed by an application (99-A) dated 14th July. 1977 but moved on 15th July, 1977 by the defendant Munney Khan in Suit No. 108 of 1969 before the trial court stating that Smt. Har Peari Devi was not the heir of the deceased Smt. Kaushilya Devi and that her heir was Smt, Kanti Devi in whose favour Smt. Kaushilya Devi had executed a registered will on 25th February, 1977 and praying that the application of Smt. Har Peari Devi for substitution in place of Smt. Kaushilya Devi deceased was liable to be rejected. Smt. Kanti Devi applied on 21st July, 1977 by an application (105-A) for substitution in place of Smt. Kaushilya Devi, the deceased plaintiff-respondent No. 1. in Suit No. 108 of 1969 before the trial court, but before she did so. an order was passed by the trial court on 14th July, 1977 on the application (98-A) directing that the amendment may be made within 7 days and another order was passed on 15th July, 1979 on the application (99-A) that it may be put up for orders on 21st July, 1977. The matter was heard by the trial court on 21st July, 1977 when it ordered that Smt. Kanti Devi's application be put up for orders on 3rd September. 1977, on which date an objection was filed by Smt. Har Peari vide-106-C to Smt. Kanti Devi's application. The matter was thereafter heard by the trial court on 20th September. 1977 and by an order of that date, it held that it had no jurisdiction to adjudicate upon the disputed question of representation of the estate of Smt. Kaushilya Devi deceased, in the appeals inasmuch as the two issues Nos. 8 and 9 had been remitted to it by the the order dated 22nd March. 1977 under Rule 25 of Order 41 and not under Rule 23.

6. When the record was returned to the lower appellate court by the trial court, an application (111-A) was moved by Smt Kanti Devi before the lower appellate court in Civil Appeal No. 272 of 1973 bringing the aforesaid proceedings taken in the trial court, to the notice of the lower appellate court and contending that the order dated 14th July. 1977 permitting amendment was wholly without jurisdiction : and even the plaint had been amended without there being any order for its amendment, in pursuance of that order dated 14th July, 1977; and that in the absence of any application for substitution by the defendant-appellant, the appeal had abated and praying that the appeal may be declared to have abated. It was. however added that in case the court held that the appeal had not abated. she may be substituted as the heir of deceased plaintiff-respondent Smt. Kaushilya Devi.

7. From the record of Suit No. 22 of 1969 and of Civil Appeal No. 208 of 1973, it does not appear that any such proceedings were taken before the trial court or before the lower appellate court after the death of Smt. Kaushilya Devi. obviously because there was no order remitting any issue to the trial court in this case. The record of the third suit No. 21 of 1969 or of Civil Appeal No. 10 of 1974

is not before me and it is accordingly not possible for me to say whether or not any such proceedings were taken in that case but I believe that the position in Suit Nos. 21 and 22 of 1969. and of Civil Appeals Nos. 208 of 1973 and 10 of 1974 was identical.

8. The order under appeal has been passed by the lower appellate court in Civil Appeal No. 10 of 1974 and it is said in the first paragraph of the order that it shall govern the other Civil Appeals Nos. 206 of 1973 and 272 of 1973. It is necessary to note that even before the application (111-A) was moved by Smt. Kanti Devi before the lower appellate court in Civil Appeal No. 272 of 1973 on 12th September, 1978. Smt. Har Peari Devi. the second plaintiff-respondent had died on 5th June, 1978. When the case was placed before the lower appellate court for orders on 21st October, 1978. it was stated by Smt. Har Peari's counsel that she had died.

An application dated 16th November, 1978 (113-C) was thereafter made on behalf of the defendant-appellant in Civil Appeal No. 272 of 1973 before the lower appellate court that Smt, Har Peari Devi had died without leaving any heirs and there was no question of any abatement of the appeal on her death. This was followed by another application dated 20th November, 1978 (114-Ga) in Civil Appeal No. 272 of 1973 before the lower appellate court, that the name of Smt. Har Peari Devi may be struck off from the memorandum of appeal.

9. The impugned order, which is common in all the three second appeals before me proceeds on the basis that no application for substitution of the legal representatives of the deceased respondents was made within limitation and that, therefore, the three appeals had abated. It is clear from the recital of the facts of suit No. 108 of 1969 and Civil Appeal No. 272 of 1973 arising therefrom, and which has given rise to second appeal No. 170 of 1979 in this Court that an application for substitution in place of Smt. Kaushilya Devi deceased plaintiff-respondent No. 1 was made by Smt. Kanti Devi (paper No. 105-A). The application was made before the trial court because the record of the case was in that court. The hearing of the two other Civil Appeals was not proceeded with and was in that sense more or less stayed to await the return of the findings of the trial court on issues Nos. 8 and 9 which had been remitted to the trial court for finding by the lower appellate court's order dated 22nd March, 1977 in Civil Appeal No, 272 of 1973. The parties cannot be blamed for not making substitution applications before the lower appellate court whether in Civil Appeal No, 272 of 1973 or in the other two Civil Appeals in this situation. Moreover, an application for substitution made by a legal representative himself is not governed by the limitation of 90 days prescribed by Article 120 of the Schedule to the Limitation Act, 1963. Even so the application of Smt. Kanti Devi for substitution made on 21st July, 1977 in the trial court was well within the period of 90 days from the "death of Smt, Kaushilya Devi on 6th June. 1977. The lower appellate court has completely ignored the existence of the said application made by Smt. Kanti Devi for substitution in place of Smt, Kaushilya Devi The order of

the lower appellate) Court appears to me to be plainly erroneous and the whole matter needs to be re-considered by it in accordance with law.

10. But contended Mr, K. B. L. Gaur. who. as observed above, appeared on behalf of Bhagwat Saran and Rishi Kumar. who claimed to be the heirs of Smt. Har Peari Devi deceased, that the second appeals in this Court are not maintainable inasmuch as the impugned order is not a decree.

11. Having heard learned counsel for all the parties on this point, it does appear to me that the preliminary objection raised by Mr. Gaur must prevail. Mr. V. K. Barman learned counsel for the defendant-appellant relied on Brij Jivan Lal and Another Vs. Shiam Lal and Others, in this context. It was held by this Court in that case that where one of the plaintiffs died during the pendency of the suit and no application was made within limitation to bring his heirs on the record and the court ordered on an application made on behalf of the contesting defendants that the suit had abated in its entirety on the ground that the right to sue did not survive to the remaining plaintiffs alone and in the result dismissed the suit, the order of abatement amounted to a decree. That is not the situation in the present case. Firstly it was the defendant who had appealed against the decree passed by the trial court in favour of both the plaintiffs; secondly both the plaintiff-respondents had died before the impugned order was passed, and further the impugned order proceeds on the basis that no application for substitution was made in respect of both the deceased plaintiff-respondents. The impugned order is a simple order declaring the three appeals to have abated on the ground that no application for substitution had been made within limitation after the death of either of the two respondents. The impugned order does not adjudicate upon the rights of the parties in any manner. In my opinion it does not amount to a decree.

12. These three appeals must accordingly be dismissed as not maintainable but in the circumstances I would leave the parties to bear their own costs and since the matter was not free from difficulty and the defendant-appellant cannot entirely be blamed for the result, it would be open to them, if so advised. to seek remedy under Article 226 or 227 of the Constitution in view of the fact that a revision u/s 115 of the CPC as amended in Uttar Pradesh would also be not maintainable.