
(1978) 03 OHC CK 0015
In the Orissa High Court
Case No : M.J.C. No. 40 of 1974

Natha Naik and Others

APPELLANT

Vs

Padmalochan Naik and Others

RESPONDENT

Date of Decision : 15-03-1978

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 3, Order 33 Rule 1, Order 41 Rule 4

Citation : AIR 1978 Ori 193 : (1978) 45 CLT 820 : (1978) 45 CLT 520

Hon'ble Judges : S.K. Ray, C.J.; N.K. Das, J

Bench : Division Bench

Advocate : S.C. Mohapatra and D.K. Mohapatra, for the Appellant; A.K. Padhi, (O.Ps. 1 and 2), General, A.S.C., Manoranjan Mohanty, for the Respondent

Final Decision : Dismissed

Judgement

S.K. Ray, C.J.—Twelve of the defendants in a suit for declaration of right, title and interest and for recovery of possession which has been decreed are the petitioners. There were originally 99 defendants in the suit whose defence was that they had acquired title by adverse possession. The plaintiffs' case essentially was that all the defendants conspired and combined to forcibly dispossess the plaintiffs from the suit land by committing various acts of trespass and did, in fact, dispossess them from the suit land. Thus, the plaintiffs' case being that the defendants jointly trespassed upon the suit land prayed for declaration of title and consequential relief of recovery of possession. It appears from the written statement that the defendants' claim was a joint possession. Accordingly, a decree for eviction was passed against all of them and that decree was a joint one and it has proceeded on a ground common to all the plaintiffs and all the defendants. From the terms of the decree it appears that it is not only joint but indivisible. It is from this decree that 12 of the defendants have appealed impleading the other defendants and the plaintiffs as respondents. They filed this application for being permitted to file this appeal in forma pauperis. During the pendency of this application petitioner No. 2 who was

defendant No. 6 died on 14-9-75. An application for substitution was made which was rejected on 29-11-77. So also four opposite parties, namely, O. P. Nos. 18, 28, 50 and 59 having died during the pendency of this pauper proceeding. Substitution applications in respect thereof were filed but ultimately rejected. Thus, petitioner No. 2 and opposite parties 18, 28, 50 and 59 or their legal representatives are no longer parties to this appeal.

2. The question, therefore, in the aforesaid context, is whether this application shall be dismissed on the ground of abatement. An application to sue in forma pauperis, as has been held by the Supreme Court in AIR 1962 SC 941 *Vijai Pratap v. Dukh Haran Nath*, is but a method prescribed by the Code for institution of a suit by a pauper without payment of fee prescribed by the Court-fees Act. There is nothing personal in such an application. The suit or the appeal, as the case may be, commences from the moment an application for permission to sue in forma pauperis is filed. Therefore, if the appeal which is on record, for any reason, abates in its entirety, this application for permission to continue that appeal in forma pauperis must necessarily fail as infructuous.

3. The next question to which we must necessarily address ourselves is whether by reason of the death of petitioner No. 2 and O. P. Nos. 18, 28, 50 and 59 the appeal can be deemed to have abated as a whole. Mr. Mohapatra contending against such a result relied upon Order 41, Rule 4 C.P.C. This Rule provides that where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or defendants may appeal from the whole decree, and thereupon the appellate court may vary or reverse the decree in favour of all the plaintiffs or the defendants, as the case may be. That Rule came in for interpretation by the Supreme Court in a number of cases. After perusing all those decisions, all of which need not be specifically referred to, the principle which has come to be established is that where in an appeal from a joint decree one or several appellants have died and his or their legal representatives have not been brought on record with the result that the appeal had abated against him or them under Order 22, Rule 3 and the appeal of the surviving appellant or appellants could not be heard because of the rule that the decree between the deceased appellant and the respondents has become final and as a necessary corollary the appellate court cannot in any way modify that decree directly or indirectly without bringing into effect two inconsistent decrees, Order 41, Rule 4 C.P.C. could not be invoked. Similarly, where an appeal could not be said to have been properly constituted or could not be said to have all the necessary parties for the decision of the controversy before the Court, by reason of non-substitution of a necessary party despondent, the entire appeal would abate and Order 41, Rule 4 cannot come to the aid of the appellant. We will refer only to one decision of the Supreme Court in *Dwarka Prasad Singh and Others Vs. Harikant Prasad Singh and Others*, as representation of this view. In this case as the decree is a joint and indivisible one and as the plaintiffs have obtained a decree for eviction against petitioner No. 2 and opposite parties 18, 28, 50 and

59 on grounds common to all other defendants and plaintiffs and that decree against them has become final it will be inconsistent with the decree which may ultimately be passed on success of the rest of the appellants. Therefore, for want of substitution of these persons, notwithstanding Order 41, Rule 4 C.P.C. the whole appeal has abated. An exact case of this nature with the identical conclusion is to be found in the case of Nanhu Ahir and Others Vs. Ganesh Rai and Another, .

In consequence of such abatement, the present application for leave to file the appeal in forma pauperis must necessarily be dismissed. Accordingly, this M.J.C. is dismissed, but there will be no order for costs.

Das, J.

4. I agree.