
(1974) 03 PAT CK 0002

In the Patna High Court

Case No : A.F.A.D. No. 704 of 1964 with Miscellaneous Appeal No. 354 of 1963

Parhlad Jha and Others

APPELLANT

Vs

Sonelal Mahton and Others

RESPONDENT

Date of Decision : 15-03-1974

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 11, Order 22 Rule 4

Citation : AIR 1974 Patna 338

Hon'ble Judges : S.N.P. Singh, J;S.K. Jha, J

Bench : Division Bench

Advocate : K.K. Sinha and Nagendra Pd. Singh, for the Appellant; Kamendra Kumar, for the Respondent

Final Decision : Dismissed

Judgement

S.K. Jha, J.—These two appeals have been preferred by the plaintiffs. The Miscellaneous Appeal is directed against the order of the lower appellate court dismissing the plaintiffs" (who were also appellants in the lower appellate court) application for setting aside abatement and substitution of the heirs and legal representatives of one Satahu Mahto, who was minor respondent No. 5 before that court. The second appeal is directed against the judgment and decree holding, in pursuance of the above mentioned order of rejection of the application for setting aside abatement, that the entire appeal before the lower appellate court had become incompetent and, accordingly, the plaintiffs" appeal before that court was dismissed.

2. Shortly stated the facts giving rise to these appeals are these. The appellants had instituted Title Suit No. 92 of 1953 for a declaration of title and recovery of possession against a number of defendants including the aforesaid Satahu Mahto, who was the minor defendant No. 5 in the suit, his father, Sonelal Mahto having been impleaded as defendant No. 1 in the suit. The suit was based on allegation, inter alia, that the plaintiffs-appellants were the rightful owners having right, title and interest to 1 B. 13 K. and 13 dhurs of land of khata No.

200 bearing survey plot Nos. 366 to 369 and 1203 and 1204 situate in village Gobindpur Bela. The defendants were alleged to be trespassers who, according to the plaintiffs' case, had dispossessed them giving rise to a cause of action for instituting the suit. The trial court dismissed the plaintiff-appellants' suit on the findings, inter alia, (i) that the plaintiffs had no right, title and interest over the disputed land, (ii) that the defendants had been coming in possession over the disputed land as of right and openly for much more than 12 years acquiring title by adverse possession and (iii) that the plaintiffs' story of possession and dispossession as alleged was not correct and the suit was barred by limitation. Against this decree of the trial court, the plaintiffs preferred an appeal before the lower appellate court which, however, was dismissed by a judgment and decree dated the 31st of January, 1959. The appellants thereafter preferred Second Appeal No. 554 of 1959 in this Court. During the pendency of the aforesaid second appeal, it transpired that one of the defendants-respondents namely, Satahu Mahto, minor respondent No. 5 son of Sonelal Mahto, respondent No. 1 had died on 3-10-1958 during the pendency of the appeal before the lower appellate court. The matter came up on the Lawazima Board before the learned Registrar on 1-8-1960 at the instance of the appellants merely for noting of the fact that the aforesaid Satahu Mahto was dead and that his heirs were already on record. On 9-12-1960, however, the respondents filed an application before this Court supported by an affidavit that the respondent No. 5 aforesaid had died leaving behind his mother, Musammat Daulat Kuar, who had not been brought on the record by the appellants within the period of limitation although the appellants knew of the existence of the mother of the deceased respondent No. 5. The appellants, thereafter on 14-3-1971 filed a counter-affidavit in this Court stating that they had learnt about the death of the aforesaid Satahu Mahto on 25-7-1960 and that at that time the appellants did not know of the existence of the mother of the deceased respondent No. 5. An application was, accordingly filed for setting aside abatement before this Court. At the final hearing of the aforesaid second appeal, this Court remanded the case to the lower appellate court, after setting aside its judgment and decree, for disposing of the appeal after passing appropriate orders on the application for setting aside the abatement of the appeal in the court below. It is on such a remand that the present judgment and decree dated the 31st of July, 1963, has been passed by the lower appellate court whereby the application for setting aside the abatement filed on behalf of the appellants was rejected and entire appeal was held to be incompetent and as already stated it is against this order and decree that these two appeals have been preferred.

3. Before advertng to the points raised by learned counsel appearing on behalf of the appellants I think it worthwhile to shortly give the findings of the lower appellate court in the matter of abatement. The learned Additional Subordinate Judge has held that the appellants have failed miserably to make out sufficient cause for setting aside the abatement. He further recorded a finding that it could not be accepted that the appellants were ignorant of the death of Satahu Mahto

before the date of knowledge alleged by them. It was further held that the appellants had also the knowledge that the deceased Satahu Mahto had died leaving behind as one of his heirs his own mother, Musammat Daulat Kuar. On these findings, the application for setting aside abatement under Order 22, Rule 9 of the Civil P. C. (hereinafter to be referred to as the "Code") was rejected and it was further held that since the decree of the trial court was a joint and indivisible decree the entire appeal as against the other respondents had also become incompetent.

4. Mr. K.K. Sinha, learned counsel for the appellants has argued that the lower appellate court committed an error of law in holding on the facts of this case that there was any abatement of the appeal in the court below. Learned counsel further urged that even assuming that the appeal could be said to have abated as against the deceased respondent, since on the allegations in the plaint, the suit was against trespassers, who in law are nothing but joint tortfeasors, the whole appeal cannot be held to be incompetent in the lower appellate court. As I shall presently show, there is no substance in either of the two contentions put forward by the learned counsel for the appellants. The matter in question has to be considered from two distinct points in view, the first being the question of abatement and the second, incompetency of the appeal on account of such abatement for it is well settled that if under the provisions of Order 1, Rule 9 of the Code the court can deal with the matter in controversy so far as regards the rights and interests vis-a-vis the remaining respondents, it shall proceed so to decide. Reference in this connection may be made to the case of *The State of Punjab Vs. Nathu Ram*, . But as already stated earlier the question of incompetency of the appeal comes later. The question with regard to abatement on the death of a defendant or respondent in its turn has to be decided keeping in view Rules 2, 4 and 9 of Order 22 of the Code. Under the provisions of Order 22, Rule 2, where there are more defendants or respondents than one and any of them dies and where the right to sue survives against the surviving defendants or respondents alone, the court has to cause an entry to be made to that effect on the record and the suit or the appeal shall proceed as against the surviving defendants or respondents. Where, however, the right to sue does not survive as against the surviving defendants or respondents alone, there the provisions of Rule 4 of Order 22 will be attracted immediately. Under the provisions of Rule 4, an application must be filed to bring on record the heirs and legal representatives of the deceased defendant or respondent on whom the right of the deceased devolves and against whom the right to sue may be said to survive. If such an application is not made within the period of limitation, namely. 90 days from the date of death, then abatement occurs and the suit or appeal shall abate as against the deceased defendant or respondent. In the event of such an abatement taking place, an application under the provisions of Rule 9 of Order 22 must be filed within the period prescribed for setting aside such abatement. These provisions of the Code have been the subject-matter of discussion on numerous occasions both in this Court as well as before the Supreme Court. In

my view there are certain well-settled principles which can now be culled out from the decisions of the Supreme Court as well as this Court. These legal propositions can be formulated in these terms. If a case is covered by the provisions of Rule 2 of Order 22, there is no question of any application for substitution. This will be a case where all the heirs of a deceased defendant or respondent are already on record in whatever capacity they may be: the decisions of this Court in the case of Musammatt Hifsa Khatoon and Others Vs. Mohammad Salimar Rahman and Others, and in the case of Barmeshwar Nath Prasad Singh Vs. Babu Kuer Rai and Others, are authorities for the proposition that if all the heirs of a deceased defendant or respondent are already on record in whatever capacity they may be, the case is fully covered by Rule 2 of Order 22 and no application for substitution of the heirs is necessary. The second proposition which in my view is equally well settled is that where all the heirs of the deceased defendant or respondent are not on record, then an application in terms of the express provisions of Order 22, Rule 4 must be made, because in such a case it cannot be said that the right to be sued against survives only on such of heirs who are already on the record. One of the earliest decisions of this Court laying down this proposition was the case of Lilo Sonar Vs. Jhagru Sahu, . This case was referred to with approval by the Full Bench of this Court in Hifsa Khatoon's case (supra) where it was held "thus, it appears that, in this case all the legal representatives of the deceased were not on the record and, therefore, the right of appeal did not survive against the surviving respondents alone, but also against the persons other than those who were already on the record. In that view of the matter Rule 2 of Order 22" obviously had no application and it was, therefore, rightly held that an application for substitution in terms of Rule 4 of Order 22 had to be made." To the same effect is the decision of the Supreme Court in Union of India (UOI) Vs. Ram Charan and Others, where their Lordships of the Supreme Court have laid " down that the procedure under Rules 3 and 4 requires an application for the making of the legal representatives of the deceased plaintiff or defendant a party to the suit. It does not say who is to present the application. Ordinarily it would be the plaintiff who would file such an application as by the abatement of the suit, the defendant stands to gain. Whoever may choose to file an application is absolutely immaterial. What, however, is mandatory is that an application has to be made for the purpose and if no such application is made within the period of time allowed by law, the suit must abate so far as the deceased plaintiff is concerned or as against the deceased defendant. The effect of such an abatement on the suit of the surviving plaintiff or the suit against the surviving defendant, however, depends upon other considerations. Therefore, where a party respondent dies although some of the heirs may be on the record, that cannot absolve the appellant of the duty to file an application in terms of Rule 4 of Order 22. The third proposition which is equally well settled, however, is that where upon the death of a defendant or a respondent an application is made bona fide within the period of limitation bringing only some of the heirs and legal representatives of the deceased on the record, then the law deems it to be a sufficient representation because an

application in terms of Rule 4 has already been filed within the period prescribed. Reliance for this proposition may be placed upon the decision of the Supreme Court in the case of Daya Ram and Others Vs. Shyam Sundari, and the Bench decision of this Court in the case of Barmeshwar Nath Prasad Singh Vs. Babu Kuer Rai and Others, . Even in the last mentioned contingency, however, it is now equally well settled that where an heir or legal representative of the deceased defendant or respondent is left out mala fide due to some ulterior motive or on account of fraud or collusion, then the legal fiction of such a full representation of the estate will not be attracted and the suit or the appeal in such circumstances will also to be held to have abated against the deceased defendant or respondent.

5. It would follow, therefore, on the facts of this case that since on the death of respondent No. 5 all his heirs and legal representatives were not on the record and no application to bring on record any of such heirs was made within the period prescribed, abatement, did, occur, only more so on the findings of the lower appellate Court. Regarding the date of knowledge of the death as well as the existence of the mother of the deceased respondent No. 5, the Court below has not accepted the case of the appellants as true; in such circumstances, there was no application made bona fide within the period prescribed in terms of Rule 4 of Order 22 and the appeal must be held to have abated as against deceased respondent No. 5.

6. Learned counsel for the appellants invited our attention to the decision of the Supreme Court in Mahabir Prasad Vs. Jage Ram and Others, for proposition that even if one of the heirs or legal representatives of a deceased respondent is on the record and no other heir or legal representative in existence is sought to be brought on record by making any application in terms of Rule 4 of Order 22, no question of abatement can arise. I am afraid, learned counsel has generalised in too broad a manner the decision of the Supreme Court in that case. The case before their Lordships was based on these facts. Mahabir, his mother Gunwanti and his wife, Saroj Devi jointly filed a suit against their lessees of certain properties belonging to the plaintiffs. The suit was decreed but at the stage of execution on a technical objection having been raised by the defendants, the executing Court refused to execute the decree in favour of Mahabir and the other two plaintiffs. Against the order of the executing Court only one of the plaintiffs-decree-holders Mahabir preferred an appeal before the High Court making his mother Gunwanti and his wife Saroj Devi as parties respondents along with the contesting respondents who were the judgment debtors. During the pendency of the appeal, Saroj Devi aforesaid died. The High Court dismissed the appeal of Mahabir on the ground that the appeal having abated as against his wife Saroj Devi, the whole appeal had become incompetent. Before the Supreme Court, the point which was canvassed was that there could not in such cases occur any abatement for the simple reason that Rule 4 of Order 22 in terms could not apply to the facts of that case. Rule 4 aforesaid contemplates the filing of an application for substitution where the right to sue does not survive against the surviving defendant or defendants alone. It was clear, therefore, that the right of

Mahabir to prosecute the appeal did survive against the surviving respondents and as such no application in terms of Rule 4 was necessary. As a matter of fact, since Mahabir was prosecuting the appeal not only for his own benefit but also for the benefit of the other co-plaintiffs including Saroj Dcvi who had been made a party respondent, and the ground of attack in the appeal being common to all three of them, namely, the appellant and the other two respondents who were his mother and his wife, in terms of Rule 4 of Order 41, the Court was expressly invested with the power and jurisdiction to grant a relief not only in favour of the appellant Mahabir but in favour of such of the respondents who had an interest common with and on the ground common to the appellant Mahabir in that case. It was on these facts and in these circumstances that their Lordships of the Supreme Court set aside the judgment of the High Court and remanded the case back holding that it was one of those cases where the provisions of Order 41, Rule 4 applied with full force and that in such circumstances there could not arise any question of abatement especially when Mahabir the appellant, as respondent Saroj's husband, was her legal representative and was already prosecuting the appeal. This is in my view what the Supreme Court actually decided in the case. In my view, therefore, the court of appeal below has rightly held that the appeal in the lower appellate court did abate as against the deceased respondent No. 5.

7. Apart from this, it must also be pointed out that the appellants cannot be permitted to raise the plea now that there was no abatement, since this Court having remanded the case on the previous occasion to the court of appeal below on the ground that the appeal had abated against deceased respondent No. 5 there, this point must be held to be barred by the principles of *res judicata*.

8. That then brings us to the next question as to whether the whole appeal had become incompetent before the lower appellate court. Learned counsel for the appellants placed reliance upon a bench decision of this Court in the case of *Digvijay Narain Singh v. Bibhunath Pandey* 1956 BUR 445 for the proposition that if the suit is against joint tort-feasors then the death of one of them will not make the entire appeal incompetent. With great respect that decision cannot be pressed into service in support of the contention of learned counsel on the facts of this case. In the case of *Digvijay Narain Singh* (*supra*), the concurrent findings of fact, of the two courts below was that the defendants who were respondents in the second appeal before this Court were joint tort-feasors. So far as the instant case is concerned, as already stated, irrespective of the averments in the plaint, the trial court while dismissing the suit definitely recorded the findings that the plaintiffs had no title and secondly that the defendants-respondents had acquired valid title by adverse possession. The appeal before the lower appellate court, therefore, could not be held to be against any tort-feasors so long as the findings recorded stood. That being the position, the only relevant question which arises for consideration is as to whether it can be said that if the appeal would have been allowed to proceed against the remaining respondents, was there or not any possibility of two contrary or inconsistent decrees coming into existence? I am of the view that the learned Additional Subordinate Judge was

quite correct in holding that in the event of any decree being passed in favour of the appellants as against the remaining respondents, there would be two parallel and inconsistent decrees. The effect of one such decree would be to hold that the trial court's decree dismissing the plaintiffs' suit on the ground that respondent No. 5 had acquired title by adverse possession as against the plaintiffs-appellants was final and that of the other would be that the plaintiffs' suit was neither barred by limitation nor adverse possession, although the claim as against the defendants and respondents was joint and indivisible and not in respect of any specific or identifiable plot or parcel of land.

9. In the result, therefore, I think there is no merit in these appeals which are, accordingly, dismissed. But in the circumstances of the case, there would be no order as to costs.

S.N.P. Singh, J.

10. I agree.