

(2000) 07 MP CK 0017
In the Madhya Pradesh High Court
Case No : First Appeal No. 489/96

Ram Kishan and Others

APPELLANT

Vs

Harbagas Ahirwar (dead) through his L.Rs. Smt. Vipta Bai
and Others

RESPONDENT

Date of Decision : 27-07-2000

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10(2), Order 22 Rule 9, Order 41 Rule 4, 151

Citation : (2001) ILR (MP) 1695 : (2001) 5 MPHT 509

Hon'ble Judges : S.C. Pandey, J

Bench : Single Bench

Advocate : Rajesh Pancholi, N.K. Patel and Deepak Kumar Ahirwar, for the Appellant; D.P. Vishwakarma, for the Respondent Nos. 1 to 8, for the Respondent

Final Decision : Dismissed

Judgement

S.C. Pandey, J.—This order shall dispose of I.A. No. 5969/98 for substitution of legal representatives of Layachibai arrayed as respondent No. 3, I.A. No. 8135/98 for setting aside abatement, I.A. No. 5970/98 for condonation of delay in filing the application for setting aside abatement. There are other interlocutory applications. Decision on those applications shall be necessary only if this Court comes to the conclusion that the appeal did not abate as a whole.

2. It is necessary to express the relevant facts in a nutshell. Harbagas Ahirwar obtained a decree against Ram Kishan, Ram Kripal, Hari Bai, Layachi Bai (Hari Bai and Layachi Bai are legal representatives of Hajarilal Ahirwar, the defendant No. 3) and Om Prakash in the following terms :--

It was declared that:--

(i) the plaintiff was the sole owner of House No. 178 situate at Shivaji Ward, Kandeli (Narsinghpur).

(ii) Consequently it was decreed that the defendant Nos. 1 to 4 shall hand over

the possession of the suit house detailed in the Schedule A of the plaint. Here, it may be made clear that Hari Bai and Layachi Bai were added as defendant Nos. 3 (b) and 3 (c) in place of the original defendant No. 3, Hajarilal who died during the pendency of the suit. Therefore, it must be presumed that Hari Bai and Layachi Bai too were directed by the decree to hand over the possession to the decree-holder.

(iii) a decree of Rs. 5,000/- was passed against all the defendants including the defendant Nos. 1 to 4.

(iv) further decree v/as passed against the defendant Nos. 1 to 4 to the effect that they shall pay Rs. 2,000/- for removal of a wall constructed by them to the plaintiff Harbagas Ahirwar.

(v) the defendant Nos. 1 to 4 were required to pay Rs. 6,950/- by way of mesne profits to Harbagas which accrued prior to filing of the suit. The Trial Court further decreed that Rs. 1,500/- per month be paid by defendant Nos. 1 to 4 to Harbagas by way of mesne profits during the pendency of the suit.

(vi) the defendant Nos. 1 to 4 were directed to bear their own costs and pay that of the plaintiff Harbagas. The rest of the defendants i.e. defendant Nos. 5, 8, 9 and 10 were required to bear their own costs.

3. Aggrieved by the judgment and decree of the Trial Court, this appeal was filed by Ram Kishan, Om Prakash and Ram Kripal. Ram Kishan was defendant No. 1 and Ram Kripal was defendant No. 2 Om Prakash was arrayed as defendant No. 4. The appeal was not filed on behalf of the defendant No. 3 (b) Hari Bai and defendant No. 3 (c) Layachi Bai and also the other defendant Nos. 5, 6, 7, 8, 9 and 10 did not file any appeal and they have not been made parties to this appeal.

4. The prayer in this appeal is to set aside the judgment and decree dated 3-8-1996 passed in Civil Suit No. 51-A/87 by the District Judge, Narsinghpur.

5. It may be made clear that Harbagas died during the pendency of this appeal and during the pendency of this appeal his legal representatives have been substituted as per order of this Court dated 6-4-1998. It appears that they are Smt. Vipta Bai, Mahendra Kumar, Basant Kumar, Raju, Ku. Bharti, Ku. Lata, Ku. Mamta and Bhupendra. Smt. Vipta Bai is widow of Harbagas and the rest of the legal representatives are sons and daughters of Harbagas.

6. Learned counsel for the appellants filed an application for substitution of legal representatives of Layachi Bai, the respondent No. 3 in this appeal on 14-9-1998 which was registered as I.A.No. 5969/98 stating that the respondent No. 3 passed away on 8-10-1997 and she was survived by only one son Dipak Kumar. It was obvious that on the date of filing of the suit, there was an abatement of the appeal at least so far as Layachi Bai was concerned, but no application was filed for setting aside the abatement initially. However, an application for condonation of delay, I.A. No. 5970/98, was filed. This procedure is not correct.

There should have been an application under Order 22 Rule 9 of the CPC for setting aside the abatement consequent to the death of Layachi Bai. However, it appears that subsequently an application for setting aside abatement was filed on 4-12-1998 registered as I.A. No. 8135/98. Though this procedure is irregular, this Court in the interest of justice, is treating I.A. No. 8135/98 for setting aside abatement of the appeal consequent to the death of Layachi Bai and takes that I.A. No. 5970/98 is for condonation of delay in filing the application for setting aside the abatement in the interest of justice. According to law, a counsel filing an application for substitution of legal representatives should file an application for bringing the legal representatives within 90 days, failing which, the appeal may abate. He is given further 60 days to file an application for setting aside the abatement. In case, 60 days have already expired, then the appellant should also file an application for condonation of delay in filing the application for setting aside the abatement.

7. Reading the application for condonation of delay, which was filed alongwith the application for substitution as well as the application under Order 22 Rule 9 of the CPC (I.A. No. 8135/98), this Court is required to decide if there was any sufficient cause for setting aside the abatement and condoning the delay in filing the application for setting aside the abatement. This Court has gone through those applications carefully and also the reply filed by the respondents who have opposed the substitution. It appears to this Court that in an application for condonation of delay nothing particular was stated by the appellants except that there was difficulty in finding out the address of the legal representatives of the respondent No. 3. In the application for setting aside abatement, which was filed subsequently on 4-12-1998, an altogether new ground was taken-up by the appellants to the effect that the appellants were ignorant of the death of respondent No. 3 and were not on talking terms with the respondent No. 3. Therefore, they could not know about the death of the respondent No. 3 and when they came to know about her death, they obtained correct address of the legal representatives of the respondent No. 3. The entire process took considerable time and then only they could file the application for substitution. This appears to be sufficient cause pleaded by the appellants from a combined reading of the application for setting aside abatement and the application for condonation of delay.

8. However, the legal representatives of Harbagas have opposed both these applications and have tiled photographs (Articles A, B and C) to show that the appellant Nos. 1 and 3 were present near the dead body of Layachi Bai. They had paid visit to the house of Layachibai upon her death. In other words, the legal representatives of respondent No. 1, Harbagas asserted that the appellants knew about the death of Layachibai on the day of death itself. For the aforesaid reason, they stated that there was no sufficient cause either for setting aside abatement or for condoning the delay.

9. This Court, by order dated 16-12-1998, ordered that the District Judge,

Narsinghpur should make an enquiry if the appellants had knowledge about the death of Layachi Bai after recording of oral evidence. The finding recorded by the learned District Judge after recording the oral evidence went against the assertion of the appellants that they did not know about the death of Layachi Bai on 8-10-1997. It was found that they had known about her death on 8-10-1997. The learned District Judge did not accept the version of the witness Ram Kishan Ahirwar to the effect that he did not know about the death of his sister Layachi Bai because she had shifted to Pipariya and had served all connection with him. The further statement that he came to know about the death of Layachi Bai after one year of her death was also rejected. The learned District Judge accepted the testimony of Smt. Vipta Bai to the effect that Ram Kishan, who was her Jeth, and the other members of the family had full knowledge of her death and they had participated in the funeral of Layachi Bai. The learned District Judge also accepted in paragraph 4 that the photographs marked as Articles A, B and C showing that Ram Kishan and Ram Kripal were present near the dead body of Layachi Bai.

10. Having heard the counsel for the parties and after going through the report of the learned District Judge and the evidence led before her, this Court affirms the finding recorded by the District Judge and does not find any infirmity in the finding. This Court is of the same view that the appellants had full knowledge about the death of Layachi Bai and, therefore, their application for setting aside abatement and for condonation of delay as well as substitution of legal representatives on record are liable to be rejected.

11. The next question, that arises, is what would be the consequence of not substituting the legal representatives of Layachi Bai within 90 days although there was no sufficient cause for making any delay beyond 90 days.

12. It has been argued on behalf of legal representatives of Harbagas by learned counsel Shri D.P. Vishwakarma that the entire appeal abated and, therefore, it is liable to be dismissed for that reason.

13. Learned counsel for the applicant Deepak Kumar Shri N.K. Patel and Shri Rajesh Pancholi for the appellants, however, argued that even if this Court came to the conclusion that there was no sufficient cause, there was no abatement of the appeal. Both the learned counsel took umbrage under this plea instead of countering the allegations made in the reply that the death of Layachi Bai was known to the appellants. In fact, the appellants seem to have abandoned their case on facts.

14. The question posed by the rival counsel for the parties can be decided by looking to the nature of decree. It cannot be disputed that the decree passed by the Trial Court became the estate of the deceased Harbagas. Therefore, it is necessary to find out from the decree itself if the appeal could be still pursued by the appellants without impleading the legal representatives of Layachi Bai. One of the tests, that has been laid down in this behalf, is that the Court has to find

out if the decree is joint and indivisible. If that be so, whole of the appeal abates. Otherwise, the appeal abates against the interest of the deceased person only because it can be separated from the rest of estate belonging to persons who are alive. In the case of *The State of Punjab Vs. Nathu Ram*, it was held that when the appeal was joint against two brothers and one of the brothers died whose legal representatives were not brought on record, the appeal abated against the other brothers too, who was alive. It was stated that the test for determining if the appeal abated would depend upon the circumstances of each case. One of the tests suggested was the Court should ask whether it could proceed in the appeal in absence of a party who is dead. It can proceed against the party who is alive if its interest in estate could be treated as separate. That is to say the decree passed against deceased person was severable. In case, it is joint and indivisible, the Court could not proceed further because it was unable to sever the connection of dead man's property with that of the living and consequently was liable to interfere with the property of a dead person against whom the appeal had abated. The other test suggested was that in case the appeal was allowed, there was possibility of passing of contradictory decrees. The decree against the dead person would become final because it abated and those alive were liable to be set aside under same facts and circumstances. In other words, the possible contradiction was brought upon by fortuitous circumstance of death and was not inherent in the plaint itself by claim of severable decrees in respect of those alive and dead separately. Another test was that in absence of the deceased person, the appeal could be said to be validly constituted.

15. Bearing those principles laid down by the Supreme Court in mind, it is unnecessary to mention the number of authorities cited by the counsel for the legal representatives of Harbagas. What is necessary is that the Court should examine the decree of the Lower Appellate Court and determine if it is joint and indivisible. In other words, if the Court comes to the conclusion, it would be necessary to set aside the decree which is passed against the respondent No. 3, Layachi Bai in order to give relief to the appellants, the appeal would abate as a whole. The decree passed by the Trial Court has already been reproduced by this Court earlier. It is clear from the nature of the decree that so far as the reliefs granted by the decree of declaration and possession are concerned, they are joint and indivisible. The appellants cannot get the decree of declaration and possession in their own favour and allow the decree passed against Laychi Bai to remain as such. Even if this Court sets aside the decree passed against the appellants, the decree against Layachi Bai could not be set aside on account of abatement. The Court cannot give relief to the appellants by passing two contradictory decrees as the decree is joint and indivisible. The Court is not authorised to bifurcate it in order to give relief to the appellants. The conclusion of this Court can be spelled out from the allegations made in the plaint. Harbagas had filed a suit on the basis of a Patta granted by the Collector in respect of Nazul Plot No. 29/1, for which he allegedly paid his premium which was subsequently enhanced. It was also claimed that on the plot obtained by virtue

of the Patta granted by the Collector, Harbagas had raised certain constructions from his self-acquired income. He claimed to be in possession of those shops. It was further stated in the plaint that despite the fact that he was owner of the plot as well as the suit house, the defendants were interfering with his possession and had encroached upon his land and has removed certain pieces of furniture after taking possession. They had also constructed a wall on the plot without any authority of law. The suit was also for mesne profits, for wrongful possession and damages. The suit was against all the defendants, but the Trial Court found that it was the defendant Nos. 1 to 4 who had taken wrongful possession of the suit property. Thus, they were the persons against whom the Trial Court passed a joint and indivisible decree. It became joint and indivisible estate of Harbagas and after his death, that of his legal representatives. Thus, both the first two tests - (i) the decree was joint and indivisible, and (ii) the possibility of passing of contradictory decrees only on account of the death of Layachi Bai, were fulfilled. Even otherwise, all the defendants would be necessary parties in the appeal without whose presence the decree could not be set aside. Therefore, this Court comes to the conclusion that upon death of Layachi Bai, her legal representatives were necessary parties to this appeal. It does not matter whether Layachi Bai was arrayed as an appellant or a respondent. She was the person against whom joint and indivisible decree was passed. In this connection, this Court relies on the decision in the case of Ram Sarup Vs. Munshi and Others, , wherein their Lordships pointed out that in an appeal from the decree of pre-emption, the legal representatives of all the decree holders should be made parties to the appeal. The appeal was preferred by the Vendors against the pre-emptors who were given a decree to purchase the agricultural properties on their right of pre-emption. The Vendors had challenged the right of pre-emption and also challenged the validity of Section 15 of the Punjab Pre-emption Act. It was held by the Supreme Court that the decree granting right to purchase the property on the basis of right of pre-emption was one and indivisible, although, the property purchased on the basis of that right could be enjoyed separately.

16. For all these reasons, there is no escape from the conclusion that the suit should abate as a whole. So far a declaration and possession is concerned, same position obtains for the money part of the decree which is in respect of mesne profits prior to filing of the suit and the damages and those granted during the pendency of the suit. Similarly, the decree for payment of a fixed amount for removal of wall illegally constructed bound the appellant as well as the legal representatives of Layachi Bai and Harbagas. For all these reasons, there is no escape from this conclusion that the appeal abated as a whole on the death of Layachi Bai and not merely partially as claimed on behalf of the appellants.

17. Faced with these circumstances, the learned counsel for the appellants argued that the appellants were co-defendants in the suit filed by Harbagas and consequently they could file an appeal without impleading all other defendants who did not want to file the appeal. For the aforesaid reason, this appeal could also be treated on behalf of the legal representatives of Layachi Bai who was the

respondent No. 3 in this appeal. It was argued that there was no question of abatement. The appellants had filed another application for imploding the legal representative of Layachi Bai under Order 1 Rule 10 (2) read with Section 151 of the CPC (I.A. No. 3219/99). It was argued that this application should be allowed and the appellants should be permitted to implead the legal representatives of Layachi Bai. It appears to this Court that the application under Order 1 Rule 10(2) of the CPC is to be read with Order 41 Rule 4 of the CPC and not with Section 151 thereof. In this connection, it may be pointed out that in the case of Rameshwar Prasad and Others Vs. Shyam Beharilal Jagannath and Others, , the distinction between Order 41 Rule 4 of the CPC and Order 22 Rule 9 of the CPC was made clear. It was held that provisions of Order 41 Rule 4 of the CPC and Order 22 Rule 9 of the CPC operated at different stages. Order 41 Rule 4 of the CPC enabled one of the parties to appeal against a judgment and decree where common question of law and facts arise, but this rule did not permit the appellants to bye-pass the provisions of Order 22 Rule 9 of the CPC on death of a party. In that case, one of the appellants had died during the pendency of the appeal and the Supreme Court declined to grant leave to apply the provision of Order 41 Rule 4 of the Code of Civil Procedure. It was pointed out that on abatement of an appeal. Order 41 Rule 4 of the CPC would not come into operation and the Court was not empowered to exercise the power under Order 41 Rule 4 of the Code of Civil Procedure. Moreover, even in those cases where the common questions of law and facts arise between the co-defendants and co-plaintiffs it will be a moot question in each and every case if the presence of the co-plaintiffs or the co-defendants, as the case may be, would be necessary. Similar view was taken in the case of Sri Chand and Ors. v. Mis. Jagdish Pershad Kishan Chand and Ors., reported in AIR 1966 SC 1427. Moreover, Order 41 Rule 4 of the CPC enables a Court to reverse a joint decree when only one of the parties against whom the decree is passed had filed an appeal. This is a discretion conferred upon the Court. This discretion cannot be exercised when the appeal abates as a consequence of non-substitution of the legal representatives of a respondent to whom the appellants themselves considered as a necessary party and impleaded her. The Court is required to exercise discretion only in those cases when it comes to the conclusion that the presence of a party was not necessary for getting the decree set aside as the decree proceeded on common questions of facts and law against all the parties including a non-appealing party. The words used under Order 41 Rule 4 of the CPC are "may". Such a discretion can be only exercised at the time of passing of a final decree and not before it when the Court comes to the conclusion that the presence of a party who had not appealed therefrom was not necessary. In this case, this Court while refusing to set aside abatement was already held that the decree passed against the appellants and the respondent Nos. 2 and 3 was indivisible and it could not be set aside without impleading the respondent No. 3, Layachi Bai in the appeal or without bringing her legal representatives on record. It has also been held that there was possibility of passing of conflicting decrees under the same set of circumstance. In such a case, there is no occasion to

exercise power under Order 41 Rule 4 of the Code of Civil Procedure.

18. The result is that all the applications filed by the appellants; I.A. No. 5969/98 for substitution of legal representatives of respondent No. 3 Layachi Bai, I.A. No. 5970/98 for condonation of delay, I.A. No. 8135/98 for setting aside the abatement and I.A. No. 3219/99 for substitution of legal representative of respondent No. 3 Laychi Bai are hereby dismissed. It is not necessary to pass any order on I.A. No. 8136/98 for taking rejoinder on record, as the rejoinder has already been considered for holding that there was sufficient cause or not. No order need be passed also on I.A. No. 8134/98 for amendment in appeal. The consequence is that the entire appeal abates and is hereby dismissed.