

(1968) 08 PAT CK 0006

In the Patna High Court

Case No : Misc. Appeal No. 169 of 1968

Ram Kumar Agarwalla and Another

APPELLANT

Vs

The Buxar Oil and Rice Mills Ltd. and Others

RESPONDENT

Date of Decision : 19-08-1968

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 9, Order 42 Rule 1, Order 42 Rule 1, Order 43 Rule 1(k)

Citation : (1969) PLJR 598

Hon'ble Judges : S.C. Mishra, Acting C.J.; B.D. Singh, J

Bench : Division Bench

Advocate : Rash Bihari Singh, Rana Pratap Singh and Sachchidanand Singh, for the Appellant;

Judgement

S.C. Mishra, A.C.J. and B.D. Singh, J.—The question for consideration is the maintainability of the appeal which arises out of an order passed by the 1st Subordinate Judge, Arrah, in Title Suit No. 45/155 of 1961/1965. The order was passed on the 20th of May, 1968, holding that the plaintiffs' suit abated for failure to bring on record, within the time allowed by law, the heirs of defendant no. 10, Sitaram Bhartiya, who died on the 24th of February, 1964. The plaintiffs filed a petition for setting aside the abatement after condonation of the delay, and then to bring on record the heirs and legal representatives of defendant no. 10 on a consideration of the evidence adduced by the parties and the circumstances of the case, the learned Subordinate Judge came to the conclusion that the plaintiffs had failed to make out sufficient cause for setting aside the abatement, and held that the suit abated. The plaintiffs have come up to this Court in appeal from the order of abatement passed by the learned Subordinate Judge under Order XLIII Rule 1(k) of the Code of Civil Procedure. The office note, however, points out that the order dismissing the suit as having abated as a whole is a decree and appealable as such, and so a regular first appeal also should have been filed. Reference is made in this connection to the order passed by a learned single Judge in (1) Second Appeal No. 1092 of 1962 and (2) Second

Appeal No. 1057 of 1963. Prima facie, Order XLII Rule 1(k) of the CPC makes specific provision that an order under Rule 9 of Order XXII refusing to set aside the abatement or dismissal of a suit is appealable under this clause which means that a miscellaneous appeal would lie from such an order. It is notable that the language of Clause (k) is so comprehensive as to cover not only the order of the court below refusing to set aside the abatement but also dismissal of a suit. Dismissal of a suit in this case must refer also to dismissal of an appeal as has been shown hereafter. Thus, a mere order refusing to set aside the abatement or dismissal of a suit or appeal also would be amenable to Clause (k) of Rule 1 of Order XLII. The office note, therefore, saying that an order dismissing the suit, as in this case, as having abated as a whole was a decree and appealable as such, and a regular first appeal, therefore, should have been filed, is not warrant by Order XLIII Rule 1(k). A simple miscellaneous appeal preferred from such an order dismissing a suit or appeal as having abated would serve the purpose. If the Legislature had intended that a mere order refusing to set aside an abatement would be appealable under Order XLIII Rule 1(k) and the dismissal of a suit or appeal would have to be treated on a different footing, there was no reason why, in Clause (k), the wording should have been "an order refusing to set aside the abatement or dismissal of a suit". This view is also supported by a number of decisions of this Court and other High Courts, including the one in (3) Hari Saran Singh and Others Vs. Syed Md. Eradat Hussain, , in which Jwala Prasad, A.C.J. and Kulwant Sahay, J. had to consider such a situation, and they gave relief to the appellant in the miscellaneous appeal preferred to this Court, and the appeal was remanded to the court of appeal below for bringing on record the heirs as the abatement order of that Court was already set aside by this Court. Kulwant Sahay, J., who delivered the judgment in the case, observed as follows:

In the circumstances I am of opinion that the abatement should be set aside and the appeal restored and the case remitted to the learned District Judge so that he might make the substitution of the heirs of the deceased respondent and proceed to dispose of the appeal in accordance with law.

But it is clear that, although, in that case also, the appeal was held to have abated and only a miscellaneous appeal was filed in this Court and the appeal was allowed and a direction was given by the High Court to the learned District Judge for making substitution of the heirs of the deceased respondent, filing of another regular appeal from the decree following the order of abatement was not considered necessary. The same procedure was adopted by this Court in another Division Bench decision of this Court, consisting of Rowland and Chatterji, JJ., in (4) Ram Ranbijaya Prasad Singh Vs. Madho Turha and Others, , which also was a miscellaneous appeal from the order of the Additional District Judge of Shahabad. The learned Additional District Judge refused to set aside the abatement, and held that the appeal before him of the appellant to this Court had abated. While setting aside the order of the learned Additional District Judge, Chatterji, J. made the following observations:

In the circumstances I do not consider that the learned District Judge was justified in rejecting the evidence of the law agent. Accepting his evidence, I would hold that sufficient cause was made out for setting aside the abatement. I would, therefore, allow the appeal and set aside the abatement and direct that the appeal be disposed of according to law.

In that case also, no question was raised that the miscellaneous appeal was not accompanied by a regular appeal from the decree passed by the court of appeal below. It is not necessary to refer to some Calcutta decisions where the question has been considered as to whether an appeal can at all lie from the order passed by an appellate court, refusing to set aside the abatement of an appeal. This Court, however, has taken a consistently different view on that question, and it is not necessary to refer to some of those decisions.

2. The reference made by the Stamp Reporter to (1) Second Appeal No. 1092 of 1962 and (2) Second Appeal No. 1057 of 1963 appears to be of no assistance in supporting the conclusion, which he has arrived at on the footing of these two cases. It may be stated that these matters have not been gone into a regular judgment but referred to only in the orders passed by the same learned single Judge.

3. In (1) Second Appeal No. 1092 of 1962, it appears that a second appeal was preferred to this Court by the appellants. It was clearly misconceived, as we look at the matter, because the subject-matter of the second appeal could have been dealt with properly and the relief given, if a miscellaneous appeal were preferred in accordance with Order XLIII Rule 1(k). Although we are not able to understand why the learned counsel in that case prayed that a miscellaneous appeal would have to be preferred and that in the Court of the District Judge, the fact remains that the learned single Judge, in his order, has nowhere said that a second appeal should have been preferred along with another miscellaneous appeal. It is true, no doubt, that the second appeal preferred to this Court was ordered to be kept on the file pending orders to be passed by the learned District Judge in the miscellaneous appeal relating to the question of abatement; but all this may have been due to the prayer made by the learned counsel. The learned Judge has nowhere said that, whenever there is a question of abatement in a suit or appeal in the trial court or court of appeal below, both a first appeal and a second appeal as the case may be and a miscellaneous appeal must be preferred to this Court. Therefore, this order is no authority for the conclusion of the Stamp Reporter.

4. So far as (2) Second Appeal No. 1057 of 1963 is concerned, it is patently inapplicable. In that case, there was no order passed by the learned Judge excepting that there was a prayer made by the learned counsel for the petitioners (a civil revision petition alone having been filed) to convert it into a second appeal. That order, therefore, is of no assistance whatsoever. In our opinion, there is necessity for filing a regular first appeal in this case. When a party comes up to this Court from an order of abatement in a suit or appeal,

where the suit or appeal is held by the court below to have abated because of the refusal of the court below to set aside the order of abatement, a simple miscellaneous appeal under Order XLIII Rule 1(k) would serve the purpose, and it will be unnecessary prolongation of the proceedings and harassment to the party if the party is required to file also a regular appeal.