

(1953) 09 PAT CK 0005
In the Patna High Court
Case No : A.F.O.D. No. 537 of 1946

Ramdhari Singh and Another

APPELLANT

Vs

Rambharosa Singh and Others

RESPONDENT

Date of Decision : 29-09-1953

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 11, Order 41 Rule 33, 151

Citation : AIR 1955 Patna 237

Hon'ble Judges : Imam, C.J.;Narayan, J

Bench : Division Bench

Advocate : B.C. De, R.K. Sinha and Kumar Bahadur, for the Appellant; Lal Narain Sinha, Ambujakshya Ghose, Lakshmi Narain Sinha, D.M. Sharma and A.K. Pd., for the Respondent

Final Decision : Dismissed

Judgement

Imam, C.J.—This is an appeal against the decision of the . Additional Subordinate Judge of Gaya who decreed the suit of the plaintiffs on contest against defendants 6 and 7 and "ex parte" against the rest. He also ordered a preliminary decree for partition to be drawn up having declared the plaintiffs' title to the properties in the suit. He further held that the plaintiffs were entitled to get mesne profits which would be ascertained in subsequent proceedings and that on plaintiffs' petition a commissioner would be appointed to carve out a separate "takhta" of 6 annas 8 plea kham which is equivalent to 2 annas 8 pies pokhta out of 16 annas kham which is equivalent to 6 annas 10 pies pokhta of the mukarrari interest in tauzi Nos. 12443 and 12455. When the appeal was filed the appellants were Ramdhari Singh, appellant 1, who was defendant 6 in the Court below, and Kishundeo Tiwari, appellant 2, who was defendant 7 in the Court below.

2. A preliminary objection has been taken that the appeal has abated. Before I deal with the preliminary-objection it is necessary to state briefly what the case of the plaintiffs is.

3. The plaintiffs filed the suit for a declaration of their title to 6 annas 10 pies pokhta mukarrari interest in villages Nima and Kornatho bearing tauzi Nos. 12443 and 12455. These tauzis were carved out of the parent tauzi No. 4548. The plaintiffs, father and son are members of a joint family of which plaintiff 1, Rambharosa Singh, is the "karta". They had purchased 2 annas 8 pies mukarrari interest in villages Nima and Kormatho belonging to Durga Singh in execution of a money decree in May, 1940, and delivery of possession was given by the Court. The case of the plaintiffs was that this 2 annas 8 pies pokhta mukarrari interest of Durga Singh in villages Nima and Kormatho was entirely separate and had nothing to do with the 2 annas 8 pies milkiat share of his son Gobardhan Singh, defendant 1. Defendants Ramdhari Singh, defendant 6, and Kishundeo Tiwari, defendant 7, were the real defendants who contested the suit of the plaintiffs. Their contention in the main was that the plaintiffs had acquired nothing by the execution sale in May, 1940, and that in any event the mukarrari interest of Durga Singh of 2 annas 8 pies after his death merged in the 2 annas 8 pies milkiat share of Gobardhan Singh, defendant 1.

4. The Additional Subordinate Judge, after at very elaborate consideration of the evidence in the case, oral & documentary held that the following facts were proved: (1) that the mukarrari tenure had been created before 1882 and, therefore, Section 111, T. P. Act, did not apply in the case, but only the general law of merger would be applicable; (2) that there was only one tenure of 6 annas 10 pies mukarrari Interest belonging to Gobardhan Singh in village Nima alone; (3) that Gobardhan Singh had 2 annas 8 pies undivided proprietary interest in villages Nima and Kormatho, while he had 6 annas 10 pies mukarrari Interest in village Nima, therefore, there could not be any merger of these two interests and (4) that Gobardhan Singh alone had 2 annas 8 pies proprietary interest in these two villages while 6 annas 10 pies mukarrari interest was purchased by Durga Singh from the joint family fund and therefore, the sons of Durga had some interest in this mukarrari share. In the circumstances, he thought it was clear that there was no merger of mukarrari and proprietary interest of 2 annas 8 pies as stated by the defendants up to the year 1919. He further held that the evidence of the defence witness 7 clearly shows that even after the Collectorate partition he or his father did not intend that 2 annas 8 pies mukarrari interest should merge in the 2 annas 8 pies proprietary interest. He was further satisfied that they were interested in keeping the two interests separate from each other. He accordingly, as I have already stated, declared the plaintiffs' title to 2 annas 8 pies mukarrari interest in villages Nima and Kormatho and passed a preliminary decree for partition.

5. The preliminary objection which has been taken that the appeal has abated arises in this way. Kishundeo Tiwari, appellant 2, died on 10-1-1950. An application for substitution was filed on 21-3-1950. On 24-4-1950, talbana was filed, but it appears that notice had not been served on respondent 9. Time was given to the appellants to file fresh processes for notice on respondent 9, but this was not done. Ultimately the matter was placed before the Bench which while

giving further time passed a peremptory order to the effect that if processes and talbana were not filed within the time allowed regarding fresh notice on respondent 9 the application for substitution in place of the deceased appellant 2 would be dismissed. On 20-11-1952, an application for addition of parties was filed. No application for setting aside the abatement or for the restoration of the application for substitution had been filed.

6. Mr. De on behalf of the appellants has urged that under the provisions of Order 41, Rule 33, and under the inherent power of the Court u/s 151, Civil P. C. this Court should allow addition of parties. Respondent 9 was not in the least interested in the appeal and had, it appears, not contested the suit of the plaintiffs. The peremptory order made by the Bench should have been that the application for substitution as against respondent 9 only would stand dismissed if the processes and talbana concerning that respondent were not filed within the time allowed and not that the entire application for substitution would be dismissed. It seems to me, however, that at this stage we cannot sit in appeal over the order actually made by the Bench. It was the duty of the appellants to have pointed out to the Bench that the presence of respondent 9 was unnecessary and service of notice upon him may be dispensed with. The appellants, however, did not do so and as matters stood before the Bench the order could not, in my opinion, be in any other form than it was. Be that as it may, we have to take the order as it was made and that order is to the effect that the application for substitution in place of the deceased appellant 2 would stand dismissed if the processes and talbana for the service of notice on respondent 9 were not filed within the time allowed, Admittedly the processes and talbana were not filed within the time allowed and the application for substitution stood dismissed. The result has been that in place of the deceased appellant 2 no substitution has taken place.

7. The consequence of no substitution of legal representatives in place of deceased appellant 2 having taken place has to be ascertained in order to determine as to whether the whole appeal has abated. It cannot be doubted that so far as the appeal of appellant 2 is concerned it has abated. The decree passed by the Additional Subordinate Judge as against the deceased appellant 2, therefore, stands, and according to that decree the plaintiffs' title to 2 annas 8 pies mukarrari share in villages Nima and Kormatho has been declared and a preliminary decree for its partition has been made and the plaintiffs have been declared to be entitled to mesne profits. If the appeal of appellant 1 is allowed to be continued and the decree of a similar nature against this appellant is set aside, there would be in existence two conflicting decrees. The defence of appellant 1 and the deceased appellant 2 was substantially the same, namely, that the plaintiffs had acquired nothing by the sale in execution of their money decree and that in any event there was merger of the 2 annas 8 pies mukarrari share in the 2 annas 8 pies milkiat share of Gobardhan Singh, defendant 1, son of Durga Singh. It is not permissible to allow the existence of conflicting decrees.

One of the tests as to whether an appeal as a whole has abated is as to whether if the appeal succeeds there will be in existence conflicting decrees. If such be the position, then the appeal as a whole abates and not partially. In my opinion, different considerations arise between the abatement of a suit and the abatement of an appeal because in a suit if there is an abatement it is before the passing of a decree and the question of conflicting decrees coming into existence does not arise. I may refer to the case of -- Apurba Krishna Mitra Vs. Ram Bahadur and Others, . It seems to me that no substitution of legal representatives in place of the deceased appellant 2 having taken place, in the circumstances of this case it must be held that the appeal as a whole has abated and not merely that the appeal of the deceased appellant; 2 only has abated.

8. It was, however, urged that under Order 41, Rule 33, it was permissible for this Court to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and that this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties although such respondent or parties may not have filed any appeal or objection. In my opinion, while the provisions of R. 33 of Order 41, Civil P. C. give wide powers to this Court as to the nature of the decree which it should pass, in terms, the provisions of Rule 33 do not empower the Court to add parties where the appeal as a whole has abated. The abatement of an appeal results in a valuable right accruing to the respondents, and if the Court readily added parties which would result in such a valuable right being destroyed it would be acting far beyond what was contemplated in Rule 33 of Order 41, Civil P. C. In the case of -- AIR 1927 252 (Privy Council) their Lordships of the Privy Council were considering as to what is the meaning of the words "is interested in the result of the appeal" appearing in Order 41, Rule 20, Civil P. C., and Sir John Wallis delivering the judgment of the Privy Council observed that giving these words their natural meaning it seems impossible to say that in that case the defendants against whom the suits had been dismissed, and as against whom the right of appeal had become barred, were interested in the result of the appeal. Sir John Wallis then observed as follows :

"The Appellate Court "was then asked to take action under Order 41, Rule 33. That rule empowers an Appellate Court to pass any decree and make any order which ought to have been passed or made, and to make or pass such further decree or order as the case may require, and provides, further, that this power may be exercised notwithstanding that the appeal is as to part only of the decree, and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection.

Here the plaintiff, whose suits had been dismissed against all the defendants, failed to appeal against the decrees in so far as they affected some of them and

allowed the appeal as against them to become barred. In these circumstances the Appellate Court, in the exercise of their discretion, refused to take action under the rule so as to deprive these defendants of the very valuable right which they had acquired in consequence of the plaintiff's failure to appeal against the decrees in so far as they affected them. Assuming that under this rule the Court in a proper case might add a defendant as respondent for the purpose of passing a decree against him, their Lordships see no sufficient reason for interfering with the refusal of the Appellate Court to do so in this Instance."

In the present case the respondents have certainly acquired a valuable right because the appeal having abated the decree in favour of the plaintiffs stands and an appellate Court should not readily deprive the respondent-plaintiffs of the valuable right, accruing to them as the result of the appeal having abated.

9. Mr. De. however, was not unmindful of the decision of the Pull Bench of this Court in the case of -- Ramphal Sahu and Others Vs. Babu Satdeo Jha and Another, , where it was held that In the case of all the plaintiffs or defendants appealing from a decree, and the decree appealed from proceeds on a ground common to all the plaintiffs or defendants, and one of them dies and no substitution is effected within time and an application for setting aside the abatement, so far as the deceased appellant is concerned, is refused, the appellate Court has no power under Order 41, Rule 4, Civil P. C., 1908, to reverse or vary the decree in favour of all the plaintiffs or defendants. He, however, pointed out that in spite of this decision, which was as the result of a reference made to the Pull Bench in P. A. No. 232 of 1936, D/- 6-5-1941 (Pat) (D), their Lordships who heard that First Appeal held that the High Court's power to move under Order 41, Rule 33, or under its inherent power remained unfettered to be exercised in the peculiar circumstances of each case. The learned Judges who decided F. A. No. 232 of 1936 (Pat) (D) were parties to the decision of the Full Bench in the case of Ramphal Sahu and Others Vs. Babu Satdeo Jha and Another, . Manohar Lall J., who delivered the judgment in the First Appeal, however, did make the following observation :

"Having examined the authorities strongly relied upon by the learned Advocate for the respondent, I am inclined to the view that although it is true that the provisions of Order 41, Rule 4, and Order 41, Rule 20, cannot be applied to add the legal representative of a deceased appellant who has failed in getting an abatement of the appeal set aside, that these provisions cannot also be invoked to make the legal representative a party to the appeal when he was not a party to the suit in the Court below, but the jurisdiction of the High Court to move under Order 41, Rule 33, or under its inherent powers remains unfettered to be exercised in the peculiar circumstances of each case always bearing in mind that the Court should be slow to exercise that discretion merely to aid one party against the other."

10. The application for substitution in the present appeal stood dismissed for non-compliance of a peremptory order and no substitution has taken place in the

place of the deceased appellant 2. The Patna High Court has added a rule, Rule 14A to Order 41, Civil P. C. which enables the Court in a proper case to exempt service of notice upon a particular party. The appellants did not ask this Court to exercise any such power. They also did not apply for setting aside of the abatement of the appeal of appellant a and they did not apply to this Court for the restoration of the application for substitution which had been dismissed for non-compliance of the peremptory order. In these circumstances it appears to me that to allow the addition of parties now would be to aid one party guilty of laches and thus deprive the respondents of a valuable right which has accrued to them.

Certain decisions were cited, apart from what was done in F. A. No. 232 of 1936 (D), to show that the Court has inherent power to add parties even if the provisions of Rule 33 of Order 41 did not apply. On behalf of the respondents, however, certain decisions were also cited to show that the inherent power was not exercised. Assuming for a moment that it is permissible for this Court at this stage to add parties, whether under Order 41, Rule 33, or under its inherent power, I am of the opinion that this is not a fit case to which such a power should be exercised. To do so would be to deprive the respondents of a very valuable right which accrued to them entirely due to the laches of the other side. The application for adding parties is accordingly dismissed.

11. In my opinion, the preliminary objection must succeed and it must be held that the appeal as a whole has abated and it must be dismissed as such with costs.

Narayan, J.

12. I agree.