

(1959) 01 AHC CK 0001
In the Allahabad High Court
Case No : Second Appeal No. 448 of 1952

Rameshwar Prasad and Others

APPELLANT

Vs

Shyam Beharilal Jagannath Cloth Merchant and Another

RESPONDENT

Date of Decision : 07-01-1959

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 11, Order 22 Rule 3, Order 41 Rule 4

Citation : AIR 1960 All 741

Hon'ble Judges : D.N. Roy, J

Bench : Single Bench

Advocate : Jagdish Swaroop and O.N. Mehrotra, for the Appellant; N.P. Asthana, D. Sanyal and M.N. Shukla, for the Respondent

Final Decision : Dismissed

Judgement

D.N. Roy, J.—This is a plaintiffs' second appeal arising out of a suit for ejectment and rent in respect of House No. 49/19 situate in Generalganj in Kanpur. Messrs. Manni Lal Beni Madho defendant No. 1 had been a tenant of the plaintiffs in this house on a monthly rent of Rs. 70/- per month. The tenancy had been from month to month beginning from the first of each Hindi calendar month. On the date of the suit, rent had fallen in arrears to the extent of Rs. 420/- and it had not been, paid by defendant No. 1 in spite of demand. Defendants No. 1 had led defendant No. 2, namely, Messrs Shyam Behari Lal Jagannath into occupation of the premises as a sub-tenant.

The date when the sub-tenancy began was the subject of dispute between the parties. Whereas the plaintiffs had contended that the sub-tenancy began after the 1-10-1946 without their knowledge and consent, the defendants contended that the subtenancy began in August, 1946, with the permission of the plaintiffs. The question became important because of the restriction on eviction, imposed by Section 3 (i) of the U.P. (Temporary) Control of Rent and Eviction Act, No. III of 1947. The plaintiffs had filed the suit after obtaining necessary permission of

the Collector to evict defendant No. 1 from the premises. They contended that there was no privity of contract between them and defendant No. 2 and consequently defendant No. 2 was liable to eviction along with the other defendant.

2. Defendant No. 1 resisted the suit on the ground that the subletting was done with the permission of the plaintiffs; that defendant No. 1 offered rent to the plaintiffs but it was not accepted by them; that defendant No. 1 urgently requires the shop for his own personal use and he was taking necessary steps to eject defendant No. 2 and that the suit has been instituted by the plaintiffs to bring undue influence upon him with a view to enhance the rent.

3. Defendant No. 2 pleaded that the subtenancy was created by defendant No. 1 in his favour on 2-8-1946, at Rs. 70/-; that on that date he gave defendant No. 1 a sum of Rs. 300/- with a stipulation that defendant No. 1 would return the amount to him after a year; that defendant No. 2 has regularly been paying the rent to the principal tenant; that the suit was brought by the plaintiff in collusion with defendant No. 1 and that having regard to the provisions of the U. P. (Temporary) Control of Rent and Eviction Act, 1947, he was not liable to be ejected.

4. The trial Court held that the Sub-tenancy was created subsequent to 1-10-1946, without the permission of the landlords, that defendant No. 13 committed wilful default in the payment of rent to the plaintiffs, that the plaintiffs having obtained necessary permission from the District Magistrate to eject defendant No. 1, the permission will act to operate against defendant No. 2 as well, that no notice of ejectment was necessary to defendant No. 2, and that the suit was a collusive suit between the plaintiffs and defendant No. 1, that non-payment of rent by defendant No. 1 to plaintiffs will not annul the sub-tenancy, and that since the subletting was done subsequent to 1-10-1946, without the plaintiffs' permission, the defendant No. 2 was liable to ejectment. The trial Court decreed the suit for ejectment against both defendants and decreed the suit for rent against defendant No. 1 only. Defendant No. 1 submitted to that decree. Defendant No. 2 preferred an appeal (Civil Appeal No. 291 of 1951) before the lower appellate Court.

The lower appellate Court held that the sub-tenancy was created in August, 1946, and defendant No. 1 could not therefore be ejected on the ground given in Section 3 (i)(e) of the U. P. Rent Control and Eviction Act, No. III of 1947; that there was collusion between the plaintiffs and defendant No. 1; that defendants Nos. 1 and 2 could have been evicted on the basis of the notice of ejectment and on the basis of the permission to sue granted by the District Magistrate had there been no collusion, but since collusion vitiates all proceedings, defendant No. 2 could not be ejected. The lower appellate Court accordingly modified the decree of the trial Court by refusing to eject defendant No. 2 and by holding that he, namely, defendant No. 2 stepped into the shoes of the principal tenant. The decree so far as it stood against defendant No. 1 was confirmed by the lower

appellate Court. As against that decision this second appeal has been filed by the plaintiffs.

5. During the pendency of the appeal appellant No. 3, namely Kedar Nath died, his death having taken place on 8-9-1953. An application for substitution was made on 1-10-1958, by his two sons Bithal Das and Banarsi Das. The delay in making the application for substitution was said to be due to the belief that the appeal was not pending and had been decided. Along with the application for substitution another application u/s 5 of the Limitation Act had been made. That application was rejected on 1-5-1957, by this Court by the following order:

"Appellant No. 3 Kedar Nath is said to have died on 8-9-1953. An application for substitution was made on 1-10-1958.

The delay in making this application is said to be due to the belief that the appeal was not pending and has been decided. How the belief came to be entertained by the appellant, himself has not been explained and it is difficult to accept the explanation in the absence of any details showing the basis for the belief that the appeal had been dismissed. In the circumstances it is not possible to accept the explanation offered or to condone the delay in making the application. The application is therefore rejected".

6. The application u/s 5 having been dismissed, the application for substitution was also rejected on 1-5-1957, as having been made beyond time.

7. When the appellants came up before this Court a preliminary objection was taken to the effect that the appeal having abated so far as the deceased appellant Kedar Nath was concerned, it would affect the rights of the surviving appellant to prosecute their appeal. In order to determine this question, the scope and applicability of Order XXII, Rule 3 and 11, and Order 41 Rule 4 C. P. C. have to be noticed. It appears that the question of the applicability of these provisions of the Code which had given rise to divergence of views between Courts in this country had been considered by a Full Bench of this Court in *Baij Nath and Another Vs. Ram Bharose and Others*, . In that case the previous decisions of this Court and others particularly the Full Bench decision of the Patna High Court in *Ramphal Sahu and Others Vs. Babu Satdeo Jha and Another*, which has been relied upon by the respondents had been considered and it was held that if in a suit a plaintiff makes a claim against a number of defendants on common grounds and all the defendants also contest the suit on common grounds and the suit is decided in favour of the plaintiff against all the defendants an appeal filed by all the defendants can be heard in favour of the remaining defendants after one of the appealing defendants has died during the pendency of the appeal and his legal representatives have not been brought on record so that his appeal has abated, only if the rights and interests of the surviving defendants were not joint and indivisible with those of the deceased defendant and in the event of the success of the appeal it does not lead to two inconsistent and contradictory decrees.

It was further held that while the appeal of the remaining defendants can be heard, the decision in it will not enure to the benefit of the legal representatives of deceased defendant-appellant. In the present case the appeal was filed by all the plaintiffs and one of them died during the pendency of the appeal and his legal representatives have not been brought on the record within the time provided by law so that his appeal has abated. The appeal filed by all the plaintiffs can therefore be heard in favour of the remaining, plaintiffs only if the rights and interests of the surviving plaintiffs were not joint and indivisible with those of the deceased plaintiff and in the event of the success of the appeal it does not lead to two inconsistent and contradictory decrees. Moreover, the decision in this appeal will not enure to the benefit of the legal representatives of the deceased plaintiff appellant.

In the present case the rights and interests of the surviving appellants were joint and indivisible with those of the deceased appellant. Furthermore, in the event of the success of the appeal it would lead to two inconsistent and contradictory decrees and the decision in it will not enure to the benefit of the legal representatives of the deceased plaintiff appellant. Consequently the appeal must be deemed to have abated so far as Kedar Nath the deceased appellant is concerned whose legal representatives have not been brought on record and the appeal so far as it concerns the other plaintiff appellants cannot be heard for reasons which I have already indicated above.

8. I may here mention that it would be unnecessary to consider all the cases which have been cited with reference to the provisions of Order XXII, Rules 3 and 11 and Order 41 Rule 4 C. P. C. by both sides, because those cases were considered by the Full Bench of this Court in Baij Nath and Another Vs. Ram Bharose and Others, referred to above. This Full Bench observed :

"From the very wordings of Order 41 Rule 4 it would seem that this rule was intended to be applicable to only such cases where all the plaintiffs or defendants were alive and only one or more of them had cared to appeal from the decree. To go further than this would be to hold that Order 41 Rule 4 either overrides or creates an exception to Order 22, Rules 3 and 11 and authorises the Court in effect to set aside an abatement and to reverse or vary a decree which has become final against the deceased appellant.

It is obvious that Order XLI, Rule 4 does not in express terms override Order XXII, Rules 3 and 11. . We cannot understand how it can be said that it overrides them by necessary implication. It is fair to assume that had the Legislature intended that it should override the rules referred to above, it would have expressed itself in clear terms to that effect. On this part of the case we are unable to agree with the proposition that there is no difference in principle between a case where only some of the defendants have appealed and the case where all had originally appealed and one had died during the pendency of the appeal and no steps have been taken to bring the names of the heirs or personal representatives of the deceased appellant on to the record."

9. The Full Bench further expressed its agreement with the statement of law, namely, that Order XLI, Rule 4 does not empower the appellate Court to set aside an abatement and to reverse or vary a decree which has become final against the deceased appellant.

10. Having regard to the facts and circumstances of the present case and applying the principles laid down by the Full Bench in *Baij Nath and Another Vs. Ram Bharose and Others*, , I am of opinion that Kedar Nath appellant No. 8 having died during the pendency of the appeal and his legal representatives not having been brought on record, the appeal has abated so far as Kedar Nath was concerned and since the rights and interests of the surviving appellants were joint and indivisible with those of the deceased and in the event of the success of the appeal it would lead to two inconsistent and contradictory decrees, the appeal cannot be heard qua the surviving appellants. Nor, can it be said that if the appeal of the surviving appellants is heard, the decision which may be reached in their favour after hearing such appeal will enure to the benefit of the legal representatives of the deceased plaintiff-appellant.

11. Section 3 of the U. P. (Temporary) Control of Rent and Eviction Act, 1947, inter alia, provides that subject to any order passed under Sub-section (3) of that section no suit shall, without the permission of the District Magistrate, be filed in any civil court against a tenant for his eviction from any accommodation, except on one or more of the grounds contained in that section. "Ground (e) says that the tenant has on or after the first day of October 1946 sub-let the whole or any portion of the accommodation without the permission of the landlord. In the present case the lower appellate Court has found that the subletting was done by defendant No. 1 to defendant No. 2 prior to 1-10-1946, and therefore defendant No. 2 could not be ejected on the ground given in Section 3 (e) of the Act.

The lower appellate Court further found that valid notice of ejectment was given to defendant No. 1 by the plaintiff terminating the tenancy at the end of the Hindi calendar month and defendants 1 and 2 could therefore be ejected on the basis of that notice; but since there was collusion between the plaintiffs and defendant No. 1 and collusion vitiates all proceedings, none of the defendants could be ejected, but as defendant No. 1 has not appealed against the decree of the trial Court and the decree of the trial Court therefore stood intact against him, defendant No. 1 stands ejected and defendant No. 2 continues to be tenant of the premises in suit.

It would be unnecessary for me to express any opinion on this part of the case because of the legal defect which has arisen in the hearing of the appeal in view of the death of one of the appellants and in view of his legal representatives not having been brought on record within the time provided by law. I may, however, refer to two decisions, the one in *Makhan Lal Kela and Another Vs. Girdhari Lal and Another*, and the other in *Ram Bharose Vs. Ajeet Kumar and Another*, in which it was laid down that the permission contemplated by Section 3 of the U. P. (Temporary) Control of Rent and Eviction Act has to be obtained by the landlord

against his ten-ant; and, therefore where the landlord proposes to evict a tenant and a sub-tenant both by a suit, (as in the present case) it is sufficient for him to obtain the permission u/s 3 of the Act as against the tenant only (as has been done in the present case), and he need not obtain such permission against the sub-tenant also. It was further held that a subtenant can have no higher rights than those of the tenant-in-chief from whom, he derives his title and that if the tenant becomes liable to eviction under the law, the sub-tenant cannot be allowed to continue in the accommodation.

12. The net result is that the appeal has abated so far as Kedar Nath the deceased appellant No. 3 is concerned and the appeal qua the surviving appellants cannot proceed for reasons mentioned above and qua those appellants it is therefore dismissed. Respondent No. 1 shall be entitled to his costs. Leave to appeal is refused.