
(1986) 04 MP CK 0012
In the Madhya Pradesh High Court
Case No : S.A. No. 764 of 1981

Ramlal Chourasia and Others

APPELLANT

Vs

Ganesh Prasad

RESPONDENT

Date of Decision : 08-04-1986

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 4, Order 41 Rule 25

Citation : (1987) ILR (MP) 763 : (1990) 35 MPLJ 140 : (1990) MPLJ 140

Hon'ble Judges : P.C. Pathak, J

Bench : Single Bench

Advocate : Atul Awasthy, for the Appellant; R.N. Singh, for the Respondent

Final Decision : Allowed

Judgement

P.C. Pathak, J.

This is an appeal by the defendants against order dated November 24. 1981 passed by the District Judge, Satna. whereby Civil Appeal No. 3-A of 198 1 was dismissed as abated.

Respondent Ganesh Prasad filed a suit for eviction of Kashi Prasad (since deceased) and Ramlal from the suit shops and for damages during the pendency of the suit. The suit was decreed by judgment dated October 1 8, 1 976. The defendants filed first appeal in which, by order dated August 16, 1977. four new issues were framed by the appellate Court and remitted to the trial Court under Rule 25 of Order 41, CPC (hereinafter called "the Code") with a direction to record evidence, and remit its findings.

The plaintiff filed Civil Revision No. 1292 of 1977 in this Court which was dismissed by order dated 30-1 -1979.

On March 3, 1980, Kashi Prasad died. Therefore, the plaintiff made an application before the trial Court on 10-4 1980. under Rule 2 of Order 22 of the Code to bring legal representatives of Kashi Prasad on record. The application was

allowed by an order passed on the same day. Thereafter, on 3-9-1981, the trial Court recorded its findings and sent the records to the appeal Court.

In the appeal, the plaintiff raised an objection on 1-10-1981 that the appeal had abated since no application for substitution was made in the appeal. The appellants opposed the objection and submitted that the appeal did not abate since the legal representatives of the deceased had already been brought on record by the trial Court, on an application made by the respondent plaintiff.

The appeal Court, after hearing both the parties, upheld the objection and held that the appeal abated since the appellants did not make an application for bringing on record the legal representatives of the deceased appellant Kashi Prasad. Relying on *State, by Nilratan Sircar, Enforcement Officer Vs. Lakshmi Narain Ram Niwas*, the Court below held that an order of substitution made in a suit subsequent to the filing of an appeal at an earlier stage, will move forward with the subsequent stages of the suit or appeals taken therefrom; but it cannot be projected backwards into the appeal that has already been filed. It cannot possibly become an order in the appeal. Aggrieved by the dismissal of the appeal, the surviving defendant and the legal representatives of the deceased defendant, have filed the present appeal.

The appeal was admitted on the following substantial questions of law :

"(i) Whether the lower appellate Court was right in holding that the appeal had abated when a substitution was done in the suit on a remand made by first appellate Court?

(ii) Whether the Court was right in holding that the matter has abated?"

The first question to be decided is whether an application for substitution of legal representatives of deceased Kashi Prasad could be made only in the appeal, seisin of which was retained by the appeal Court or could also be made in the Court of remand. In the impugned judgment, the Court below held the appeal abated since the substitution effected by order dated 10 4 1 980 of the trial Court, cannot enure for the benefit of the appeal.

In *Madanlal Agarwal Vs. Smt. Kamlesh Nigam*, it was held that during the pendency of a stay order passed by appellate or revisional Court, although the trial Court or the Court below may not have any jurisdiction to proceed with the trial of the suit on merit, it certainly can take such other steps which are collateral or which may be protective or which would be for the purpose of keeping the lis alive and all such steps, such as any application under Order 39, Rule 1 or 2 or an application under Order 40. Rule 1 or an application under Order 38, Rule 5 of the Code would be maintainable in the trial Court in spite of such stay order. It is also the settled law that the jurisdiction of the trial Court after remand depends upon the terms of the order of remand and the trial Court cannot consider matters other than those specified in the remand order, or enter into questions falling outside its limits, see *Rukhmanand v. Dinbandhu and Ors.*

1971 J LJ SN 159.

In *Jethmal Singh and Others Vs. Ranjeet Singh and Others*, a Division Bench of the said Court held that the Court to which issues have been remanded for trial and submission of findings, has jurisdiction to act under Rule 3 of Order 22. In that case, the High Court, on hearing an appeal, framed two issues and sent the same with record to the trial Court for findings on those issues. While evidence on two new issues, was being recorded by the trial Court, two appellants died. Thereupon, the respondents themselves applied to that Court for bringing on record the legal representatives of the deceased appellants. This application was allowed and their legal representatives were brought on record. After the findings on the issues were submitted to the High Court, the respondents submitted an application that the appeal abated since the appellants failed to bring the legal representatives of the two appellants on record who died more than a year ago. Their submission was that since the appeal was pending in the High Court, it was the duty of the appellants on record of the High Court within the time allowed by law and since that was not done, the appeal before the High Court abated. It was also urged that the legal representatives who were brought on record in the trial Court is of no assistance to the appellants. The Court held that under Rule 3 of Order 22 any party can apply for the purposes of bringing the legal representatives of a deceased party on record. It was also held that there is no prohibition in rule 3 against applying to the Court where the record was sent. Reliance was placed on *Salbat Singh v. Ramkishan*, 7 Oudh Cases 17.

Relying on the aforesaid decision, I am of the opinion that an application for substitution can be made also before the Court to which the issues have been remitted for trial and finding under Rule 25 of Order 41 of the Code. It was not disputed before me that such an application could legitimately be made before the appellate Court since seisin of the appeal was retained by it while remanding the issues.

The next question to be considered is whether the application for substitution made by the plaintiff before the Court of remand was invalid. Learned counsel for the plaintiff urged that since the appeal was pending in the appeal Court and the issues only were remitted, the proceedings before the Court of remand were continuation of the proceedings in appeal and the trial Court was acting as an agent of the appeal Court. In my opinion, it will not be correct to say that the trial Court while trying the issues remitted to it, acts as an agent of the appeal Court. Rule 25 of Order 41 of the Code makes specific reference of the Court from whose decree the appeal is preferred. The rule lays down that if the Court has omitted to frame or try any issue, or to determine any question of act, which appears to the appellate Court to be essential for right decision of the Court upon merits, the appeal Court may, frame issues and refer the same for trial to the said Court; and such Court shall proceed to try such issues and shall return the evidence to the appeal Court together with its findings thereon and the reasons therefor. Thus, it is clear as crystal that the trial Court is a separate entity

distinct from the appellate Court and it functions as the trial Court passing the decree against which the appeal has been filed.

Clause (1) of Rule 3 of Order 22 of the Code lays down that where plaintiff dies, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit. Clause (1) of Rule 4 of Order 22 also is in similar terms. From both these provisions, it is not clear as to which out of the two opposing parties has to make an application for substitution.

Union of India (UOI) Vs. Ram Charan and Others, it was observed that the procedure under Rules 3 and 4 of Order 22. Civil Procedure Code, requires an application, for 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 as by the abatement of the suit the defendant stands to gain.

In Arunachalam v. Lakshminarasiman AIR 1948 Mad. 82 a Division Bench of the said High Court held that an application to bring on record legal representatives of a deceased plaintiff or a deceased appellant, at the instance of the respondent in an appeal is maintainable.

In Kedar Nath Vs. Bismillah Begam and Another, , it was held that the rule does not confine the right to make an application to bring on record the legal representatives of a deceased plaintiff or appellant to them alone. Where, the defendant or respondent is interested in bringing a deceased plaintiff or appellant's legal representatives on record it would be open to him to do so.

In view of these decisions. I hold that the application made by the respondent before the Court of remand was not illegal. I am also of the opinion that the application, to bring the legal representatives of deceased, made by the plaintiff, before the trial Court, was rightly entertained and allowed by the Court. It enures for the appeal then pending before the lower appeal Court. Absence of an application for substitution before the appellate Court did not result in abatement of the appeal. Reliance on Rangubai v. Sundprabai (supra) by the Court below was misplaced. That was a case in which the death had taken place at stage of preliminary decree, while the application for substitution of the legal representatives was made at the stage of final decree proceedings. It was held that a suit is not continuation of an appeal. Consequently, the order bringing the legal representatives of one of the respondents on record in the final decree proceedings, will not enure for the benefit of the appeal filed against the preliminary decree and the appeal would abate so far as that respondent is concerned.

Similarly the reference to Smt. Poonabai v. Dr. Gourishankar 1971 JLJS N18, was off the mark. In this case the names of the legal representatives were brought on record in a miscellaneous appeal, pending against an interlocutory order. Since no application was made in the suit, an objection was taken that the suit abated.

A Single Bench of this Court held that as the names of the legal representatives had already been brought on record in the miscellaneous appeal, the order bringing the legal representatives on record would enure for the subsequent stages of the suit.

Consequently, the appeal is allowed. The order passed by the Court below is set aside, and it is held that the appeal did not abate. The case is remanded to the lower appellate Court with a direction to dispose it of on or before the 30th June 1986. The parties are directed to appear before the lower appellate Court on 21-4-1986. The Additional Registrar (Judicial) will see that the records of both the Courts below are despatched immediately so as to reach the lower appellate Court before 21-4-1986. The costs shall follow the event.