
(1972) 07 BOM CK 0011

In the Bombay High Court

Case No : A.F.A.D. No. 1020 of 1964

Reshmabai and Others

APPELLANT

Vs

Sona Puna Patil and Another

RESPONDENT

Date of Decision : 14-07-1972

Acts Referred:

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

Citation : AIR 1974 Bom 118 : (1973) 75 BOMLR 710 : (1974) ILR (Bom) 281

Hon'ble Judges : S.K. Desai, J

Bench : Single Bench

Advocate : M.R. Kotwal, for the Appellant; V.K. Ganpule, for G.S. Gupte, for the Respondent

Judgement

1. This second appeal reached hearing before me on 12 th July, 1972 when it was pointed out that the first respondent to this second appeal. Sonu Puna Patil (Original Plaintiff No. 1 in Regular Civil Suit No. 34 of 1960) had died on 10th October 1968. It was further stated that although intimation to this effect had been conveyed to the appellant's Advocate on 4th February 1972 no steps have been taken by the appellants to bring Sonu's heirs on the record. On this admitted position I held that the appeal had abated as far as the first respondent Sonu was concerned. The question then remained to be considered was whether the appeal had abated qua the second respondent and even if it be held that it had not abated could it be proceeded with against the second respondent ?

2. Mr. Ganpule on behalf of the second respondent contended that the appeal could not be proceeded with only against second respondent because if it was proceeded with an allowed this would result in two inconsistent decrees in the same matter remaining on the record. After this contention was stated Mr. Kotwal and Mr. Ganpule asked that the matter may be kept back for a few days and on their joint application it was kept till today for further arguments on this point.

3. In order to appreciate the point it will be necessary to state a few facts. Sonu Puna Patil and Kautik Puna Patil filed regular civil suit No. 34 of 1960 against one

Reshmabai widow of Anna alia Ananda Patil. She died during the pendency of the suit and after her death her four heirs who are the appellants before me were brought on record of the suit as defendants. In the suit the plaintiffs sought a declaration that the sale of the suit land effected by them on 15th November 1948 in favour of Reshmabai was illegal and not binding on the plaintiffs. The plaintiffs also sought to recover possession of the suit land bearing survey No. 19/2 situated within the limits of village Bhatpuri in Taluka Parola. In the plaint as it was originally filed the sale deed was attacked as benami, sham, bogus and without any consideration. It was further alleged that there was specific agreement that it was not to be acted upon. It was claimed that despite the sale deed the plaintiffs continued to remain in possession of the suit land but during their absence for about six years prior to the institution of the suit. Reshmabai had trespassed thereupon and was thereafter in possession of the suit land as a trespasser. Hence the plaintiffs brought the suit for a declaration that the sale deed was not binding on them and for recovering possession of the suit land. The suit was filed in 1960. On 16th March 1961 the plaintiffs filed an application seeking an amendment of the plaint by adding para 2-A. The application was allowed although vehemently opposed on behalf of the defendants. The amendment was carried out and by the said amendment the plaintiffs contended that the sale deed executed by the two plaintiffs in favour of Reshmabai was also hit by the provisions of Section 40 of the Bombay Agricultural Debtor's Relief Act, 1947 as the two plaintiffs were then parties to a proceeding under the said Act and as the sale of the suit land was effected without the previous sanction of the Collector or the Court.

4. In their written statement the four defendants (heirs of Reshmabai) denied all these contentions of the plaintiffs. It was also contended that the claim in suit was barred by limitation.

5. Ultimately certain issues were framed by the trial Court. Issues Nos. 2 and 3 pertained to the further pleas raised by the plaintiffs in the newly added para 2-A of the plaint. These two issues were as follows : -

"2. Do plaintiffs prove that they were debtors under the Bombay Agricultural Debtors' Relief Act at the time of suit sale-deed?

3. If yes, do they further prove that the suit sale-deed is void in view of the provisions of the Bombay Agricultural Debtors' Relief Act?"

6. The trial court directed these two issues (Issues Nos. 2 and 3) to be tried as preliminary issues and on considering material placed before it held in favour of the plaintiffs on both these issues. Having decided these two issues in favour of the plaintiffs, it granted to the plaintiffs by its order dated 26th April 1962 a declaration that the sale-deed (Exhibit 32) executed by the plaintiffs on 15th November 1948 in respect of the suit land in favour of Reshmabai was void ab initio and not binding on the plaintiffs. The defendants were further ordered and decreed to deliver possession of the suit land to the plaintiffs on the plaintiffs

depositing a sum of Rupees 1,000/- to be paid to the defendants should be permitted to remove the standing crops. as, however, the plaintiffs has succeeded on a plea taken at a late stage the parties were directed to bear their own costs.

7. Being aggrieved by this decision and order the defendants preferred an appeal to the district court at Dhulia which was numbered as Civil appeal NO. 183 of 1962. By this order dated 10th July 1963, the learned assistant Judge, Dhula dismissed the appeal confirming the judgment and decree of the trial court. However, having regard to the peculiar facts and circumstances of the case he directed the parties to bear their own costs of civil appeal No. 183 of 1962 also. this second appeal has been filed in this Court from the decision of the learned Assistant Judge, dismissing the defendants' appeal to the district Court.

8. The question is whether the defendants can now proceed with this appeal it having been held on 12th July 1972 by me that the same has abated as far as respondent No. 1 is concerned. Mr. Ganpule submitted that it was not competent for this court to proceed further with this appeal and he relied on a number of decisions of the Supreme Court in this connection commencing with its judgment in *The State of Punjab Vs. Nathu Ram*, .

9. In *Nathu Rama's* case the state of Punjab had preferred an appeal to the High Court against a joint award made in favour of two brothers Labhu Ram and Nathu Ram who were the co-respondents to the appeal. During the pendency of that appeal Labhu Ram died and his heirs were not brought on the record. The High Court held that the appeal abated against Labhu Ram and the effect of such abatement was that the appeal against Nathu Ram also abated. Accordingly the High Court dismissed the appeal. The state moved the supreme court which upheld the decision of the High Court. *Raghubar Daval. J.*, speaking for the supreme Court laid down the principles applicable in the following words:-

"The question whether a court can deal with such matters or not. Will depend on the facts of each case and therefore no exhaustive statement can be made about the circumstances when this is possible or is not possible. It may, however, be stated that originally the considerations which weigh with the court in deciding upon this question are whether the appeal between the appellants and the respondents other than the deceased can be said to be properly constituted or can be said to have all the necessary parties for the decision of the controversy before the court. The test to determine this has been described in diverse forms. Courts will not proceed with an appeal (a) when the success of the appeal may lead to the court's coming to a decision which will be in conflict with the decision between the appellant and the deceased respondent and therefore which would lead to the court's passing a decree which will be contradictory to the decree which had become final with respect to the same subject-matter between the appellant and the deceased respondent: (b) when the appellant could not have brought the action for the necessary relief against these respondents alone who are still before the court, and (c) when the decree against the surviving

respondents, if the appeal succeeds, be ineffective that is to say. It could not be successfully executed."

10. These principles were once again considered by the Supreme Court in *Ram Sarup Vs. Munshi and Others*, where the court was considering an appeal from a pre-emption decree preferred by the vendees. The appellants were five in number of whom one died during the pendency of the appeal in his supreme Court. It was held that as the decree was a joint one and sine a part of the decree had become final, by reason of the abatement, the entire appeal must be held to be abated.

11. The principles laid down in *The State of Punjab Vs. Nathu Ram*, were also reiterated in *Rameshwar Prasad and Others Vs. Shyam Beharilal Jagannath and Others*, . In this case nine persons including one Kedar Nathu had instituted a suit for ejectment and for recovery of rent against two defendants on the allegation that defendant No. 1 was the tenant-in-chief who had sub-let the premises to defendant No. 2 the District Judge set aside the decree for ejectment against defendant No. 2 and confirmed the rest of the decree against defendant No. 1. Being aggrieved by this decision of the District Judge the nine original plaintiffs filed a second appeal in the High Court. Kedar Nathu was appellant No. 3 in this second appeal and during the pendency of the same he died. His heirs were not brought on the record within the time permitted and accordingly the appeal abated as far as Kedar Nathu was concerned. When the appeals of the appellants other than Kedar Nathu came up for hearing a preliminary objection was taken for the respondent that the entire appeal had abated. The Allahabad High Court held following a full Bench decision also of the Allahabad High Court that the appeal must be dismissed inasmuch as the interest of the surviving appellants and deceased appellant was joint and indivisible, and as in the events of the success of the appeal there will be two inconsistent and contradictory decrees. Being aggrieved by this decision plaintiffs moved the Supreme Court, The Supreme Court following its earlier decision in *Nathu Ram's* case held that Kedar Nathu's appeal had abated and the decree in favour of the respondents had become final as against his legal representatives. It was observed further that it was against the scheme of the CPC to hold that Rule 4 of Order 41 empowered the Court to pass a decree in favour of the legal representatives of the deceased Kedar Nathu even though the decree against him had become final. The decisions of the various High Courts cited at the Bar have been considered by the Supreme Court in *Rameshwar Prasad and Others Vs. Shyam Beharilal Jagannath and Others*, and the correct view expounded in the following words :

" the appellate Court has no power to proceed with the appeal and to reverse and vary the decree in favour of all the plaintiffs or defendants under O.LI R. 4".

It may be mentioned as a matter of interest that the Bombay Calcutta and Madras High Courts had taken a different view but the view taken by the other Courts was preferred by the Supreme Court and declared to be correct.

12. The point once again came up for consideration before the Supreme Court in union of india (UOI) Vs. Sree Ram Bohra and Others, . There the two plaintiffs had sued the Union of India for the recovery of Rs.13,448/- as damages. The suit was decreed and the defendants were directed to pay to the plaintiffs the sum with interest. The Union of India appealed to the Patna High Court and during the pendency of the appeal one of the plaintiffs Bilas Rai died. After a lapse of more than a year the Union of India presented an application for setting aside the abatement, for condemnation of delay and for brining the heirs of Bilas Rai on record thereafter. This application was resisted and was not granted by the High Court. When the appeal came for hearing before the High Court, a preliminary objection was taken that the appeal had become incompetent and was liable to be dismissed. This objection was upheld by the High Court and aggrieved by the dismissal of its appeal the Union of India moved the Supreme Court. The Supreme Court held that there was a decree in favour of the two plaintiffs which had been appealed against, that on the death of one of them it was necessary for the appellant to impaled his heirs and legal representatives within time. That, it had failed to do so with the result that its appeal against the heirs and legal representatives of the deceased respondent was held to have abated. The result of such abatement according to the Supreme Court was that the appeal against the other respondents became incompetent.

13. In The State of Punjab Vs. Nathu Ram, three tests were indicated. In shri Chand v. Jagdish Pershad, AIR 1966 SC 1427 . Sha, J. (as he then was) speaking for the Supreme Court observed that the three tests suggested by Raghubar Daval. J. in The State of Punjab Vs. Nathu Ram, were not cumulative tests and even if one of them was satisfied, the Court might, having regard to all the circumstances, hold that the appeal has abated in its entirety.

14. All these authorities have been noted and the three principles once again enunciated in a fairly recent decision of the Supreme Court in Ramagya Prasad Gupta and Others Vs. Shri Murli Prasad and Others, . where the principles enunciated in Nathu Ram's case and the further explanation thereof in Sri Chand's case AIR 1966 SC 1427 were quoted with approval by the majority judgment. it may be pointed out that even the minority judgment approves of the principles. Matthew. J., who gave the dissenting judgment only differed from the majority in the application of these principles.

15. Now let us try and apply these principles to the facts of the present case. Sonu and Kautik jointly sued as plaintiffs and in their suit sought a declaration that the sale deed which they had executed in 1948 in favour of Reshmabai who was the original defendant to the suit was void. The two plaintiffs also sought to recover possession of the suit land from Reshmabai alleging that she had forcibly dispossessed the plaintiffs about six years prior to the filing of the suit and was a trespasser thereupon. They succeeded in obtaining a declaration and a decree for possession from the trial Court which declaration and decree have subsequently been confirmed by the lower appellate Court. This decree is joint and indivisible.

The short point is whether the Court can proceed with the second appeal today and reverse this decree which would mean a reversal only as far as the second respondent is concerned since the appeal has been declared to have been abated as far as respondent No. 1 is concerned. I am afraid this cannot be done inasmuch as doing so would amount to violation of the first test laid down in Nathu Ram's case by the Supreme Court namely the bringing on record two inconsistent decrees. In case the second appeal were to be preceded with and allowed, the declaration and order for possession obtained by Sonu will stand and will ensure to the benefit of his heirs whereas Kautik who has the same right as Sonu and stood in the same position would be held by this Court not to be entitled to the same declaration nor to an order for possession.

16. Mr. Kotwal appearing for the appellants referred me to Johan Uraon (Ekka) and Another Vs. Sitaram Sao (Bhagat) and Others, where a Division Bench of the Patna High Court was considering a somewhat similar position. Four plaintiffs filed a suit against the defendants demanding possession of certain land. A decree was granted to the plaintiffs by the trial Court from which the defendants preferred an appeal which was allowed by the subordinate Judge, Ranchi, who dismissed the suit. The plaintiffs thereafter moved the High Court in second appeal. During the pendency of the second appeal, one of the plaintiffs died and his heirs were not substituted as party appellants. Ultimately the High Court heard and disposed of the second appeal. It set aside the decisions of the lower appellate Court and directed the lower appellate Court namely the subordinate Judge to reconsider the defendant's appeal. It was heard by another subordinate Judge who came to the conclusion different from his predecessor. He affirmed the decree of the trial Court and dismissed the defendant's appeal. Thereafter the defendants moved the High Court in second appeal. They urged that the original decision of the High Court given in the earlier second appeal and all subsequent proceedings there after should be disregarded inasmuch as the second appeal has abated in to after the death of one of the plaintiffs appellants, whose heirs were not rough on record during the period allowed by the Code of Civil Procedure. This contention was rejected by the Divisions Bench in para. 7 of the above report and Mr. Kotwal very strongly relied on these observations. It is true that the Division Bench of the Patna High Court considered the judgment in The State of Punjab Vs. Nathu Ram, But, with respect, it may be stated that all the relevant observations in the said judgment have not been considered while disposing of this point.

17. The same appears to be the position in respect of the judgment of the Calcutta High Court also relied on very strongly by Mr. Kotwal. This is Abdul Hamid and Others Vs. Durga Charan Das, A single Judge of the Calcutta High Court in Abdul Hamid's case was considering a revisions application filed against a decision of a lower appellate Court namely, the subordinate Judge who had held that where two of the five appellants died during the pendency of their appeal arising out of a suit instituted by them for recovery of Khas possession of a certain plot of land, reckoning the sole defendant as a trespasser thereon, and

if the appeal against these two dead appellants abated, the whole appeal must be deemed to have abated. The judgment of the subordinate Judge was reversed by the single Judge of the Calcutta High Court who held that the surviving appellants were entitled to sue the trespasser for the benefit of all the co-owners. With respect to the learned Judge his attention does not appear to have been drawn to any of the decisions of Supreme Court mentioned earlier in this judgment.

18. I am not considering the question whether Kautik could have maintained the action and sought declaration and possession without impleading his co-owner Sonu. The position is that the action has been commenced jointly by these two brothers as co-plaintiffs and they have obtained a decree in their favour which decree has been subsequently confirmed by the lower appellate Court and which decree, joint and indivisible, is challenged in this second appeal. As far as Sonu is concerned, the decree in his favour both for declaration and possession must now stand since the appeal as far as he is concerned has been declared to have abated. If that is so it will not be possible for this Court now to modify that decree directly or indirectly. In my view the position is so obvious that it does not require further elaboration. Bearing in mind the nature of the claim in suit and the decree that has been passed by the trial Court in favour of both the respondents, which is joint and indivisible, it must be held that the appeal cannot be proceeded with only against the second respondent and must be dismissed. However, the proper order of costs seems to be to direct the parties to bear their own costs of the second appeal. There will be an order accordingly.

19. Order accordingly.