
(1936) 02 AHC CK 0042
In the Allahabad High Court

S. Zahoor Muhammad Khan	Vs	APPELLANT
Dr. M.X. De-Noronha and Others		RESPONDENT

Date of Decision : 04-02-1936

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 105(1)

Citation : 164 Ind. Cas. 730

Hon'ble Judges : Harries, J;Bajpai, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Bajpai, J.—This is an appeal against an order dated May 5, 1934, by which the 2nd Subordinate Judge of Cawnpore on appeal set aside the judgment of the trial Court dismissing the plaintiff's suit and sent the case back to it "for trial de nova after allowing the amendment sought for in application dated November 46, 1931, giving further permission to the plaintiff to make any other matter clear in the plaint along with the said amendment." It appears that the plaintiff brought a suit in the Court of the Munsif of Oawn-pore for the recovery of a certain sum of money and for the ejectment of the defendant from certain premises. In the plaint the plaintiff was described originally as M. X. de Noronha & Son, The Mall, Cawnpore. On an objection by the munsarim of the Court that the plaintiff appeared to be a firm and as such it should sue through a named individual, the plaintiff applied for amendment and prayed that the heading of the plaint should be M. X. de Noronha & Son through W. C. de Noronha senior. The suit was eventually dismissed by the learned Munsif on January 12, 1932.

2. The plaintiff appealed to the lower Appellate Court and while the appeal was pending W. C. de Noronha, senior, happened to die and an application for substitution was made more than 90 days after the death. The application for substitution was opposed and it was said that the appeal had abated. The learned Judge, however, did not accede to the contention of the respondent and allowed substitution by an order dated January 10, 1934. Later, when the appeal

was ripe for bearing, the lower Appellate Court passed the remand order mentioned by us in the beginning of our judgment.

3. In appeal before us it is contended by grounds Nos. 1 and 4 that the lower Appellate Court had no jurisdiction to entertain the appeal which had abated and the order for substitution of names was irregular. We are of the opinion that these two grounds of appeal are untenable in view of Section 105 (1), Civil Procedure Code. It is conceded by the parties that no appeal lay against the order for substitution, nor was a revision permissible. It is, however, said by learned Counsel for the appellant that this is the proper stage when the irregularity committed by the lower Appellate Court in allowing substitution of names although the appeal had abated could be set forth as a ground of objection in the memorandum of appeal to this Court. It is, however, clear that this cannot be done in an appeal against an order of remand, but the proper stage would arrive when the decree itself is appealed from. The words in Section 105 (1) are:

Where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.

4. No decree has so far been passed by the lower Appellate Court and grounds Nos. 1 and 4 taken before us are, therefore, untenable and we express no opinion on those points.

5. In order to appreciate the order of remand, it is necessary to state the pleadings in the case. In para 1 of the, plaint the plaintiff alleged that he was the owner of ahata No. 89 Bansmandi, Cawnpore. In para 2 it was alleged that the defendant was a month to month tenant of ahata No. 89 in Qasimganj, Mohalla Bansmandi, Cawnpore, and in the relief it was prayed that the defendant should be ejected from ahata No. 89, Qasimganj, Mohalla Bansmandi, Cawnpore. On this point also there was an objection by the munsarim of the Court to the effect that the boundaries of the property in suit were not given and by the application dated April 11, 1931, the plaintiff's Counsel set forth the boundaries of the property in Mchalla Bansmandi. The defendant filed his written statement and when the first witness for the plaintiff was being examined the plaintiff sought amendment by an application dated November 16, 1931, in which it was stated that although the suit was for two properties situate in Qasimganj and Bansmandi, the boundaries of the property in Bansmandi alone were appended at the foot of the plaint and the boundaries of the property situate in Qasimganj had not been so appended. Permission was therefore, sought to insert those boundaries as well. The learned Munsiff rejected this application with the result that the parties went to trial on the unamended plaint and on the merits the learned Munsiff was against the plaintiff and the suit was dismissed on January 12, 1932.

6. In appeal to the lower Appellate Court along with the other pleas taken,

ground No. 9 stated that the lower Appellate Court should have allowed the amendment as prayed for. The learned Judge considered this matter at the very outset and came to the conclusion that the amendment was sought with a view to clearing the position, of the plaintiffs. He says:

The learned Munsif presumed that Qasimdanj had another ahata number. In fact the ahata No. 89 is a very big plot of land of Cawnpore Municipality in which both Qasimganj and Bansmandi lie.

7. It is clear that the plaintiff wanted, to sue for both the properties situate in Bansmandi and Qasimganj and his case was that both were let out as a single letting and this is clear from the fact that rent at the rate of Rs. 100 per month was claimed for the entire hereditament. A perusal of the plaint makes it clear that ahata No. 89 is a big ahata and both Qasimganj and Bansmandi are included in the same though properties which were the subject-matter of the suit lay in Bansmandi and Qasimganj both and further the boundaries of the plot in Bansmandi alone were inserted in the plaint at a subsequent stage and the boundaries of the plot in Mohalla Qasimganj were not so inserted. This mistake on the part of the plaintiff might well have arisen on account of the unsettled state of Cawnpore about April 1931, when there were several communal riot's. The clerk entrusted with the duty of looking into the objections made by the munsarim could not very well go to the locality as indeed he asserts in his first application for amendment dated April 11, 1931, On the whole the learned Judge has tried to do justice between the parties and has only allowed the plaintiff to make his plaint clear and no harm has been done. The merits of the case are yet at large and the defendant has not in any way been prejudiced by the plaintiff's application for amendment being allowed in appeal.

8. For the reasons given above we are of the opinion that there is no force in this appeal and we dismiss it with costs.