
(2008) 09 CHH CK 0008
In the Chhattisgarh High Court
Case No : Second Appeal No. 183 of 2007

Shakuntala Singh and Others

APPELLANT

Vs

Prabhawati and Others

RESPONDENT

Date of Decision : 08-09-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 10, Order 22 Rule 3, Order 22 Rule 4, Order 22 Rule 5, 2(11)

Citation : (2008) 09 CHH CK 0008

Hon'ble Judges : Dilip Raosaheb Deshmukh, J

Bench : Division Bench

Advocate : Manoj Paranjpe, for the Appellant; Pramod Kumar Verma with Shri Rahul Mishra, Advocate for Respondents No. 1-a and 1-b, Shri D.N. Prajapati, Advocate for Respondent 1-c, Shri G.D. Vaswani, Government Advocate for Respondent No. 2/State, for the Respondent

Final Decision : Allowed

Judgement

Dilip Raosaheb Deshmukh, J.—This is a part heard matter. Arguments were finally concluded today.

2. The following substantial questions of law arose for determination of this appeal:

A. Whether the lower appellate Court was justified in reversing the judgment and decree passed by the trial Court on entirely new grounds and without conscious application of mind to the grounds on which the said judgment and decree was founded ?

B. Whether the judgment and decree passed by the lower appellate Court is liable to be set aside as it had allowed the application of the respondents No. 1a, 1b & 1c for impleadment, on the death of the original plaintiff namely Prabhawati Devi without holding an enquiry as contemplated under Order XXII Rule 5 of C.P.C. ?

3. I would first proceed to answer the second question of law.

4. Brief facts relevant for determination of the above question are as under:

One Prabhavati Devi had instituted Civil Suit No. 55-A/2002 before the 3rd Additional Civil Judge Class-2, Surajpur, against the appellants herein, praying that the sale deed dated 4-5-1995 got executed from her by the appellant/defendant No. 2 by fraud be cancelled and the appellants/defendants be restrained from evicting her from the suit land Kh. No. 595 area 0.5 hectares situated in Pratappur over which a house, well and Badi were constructed.

5. The trial Court dismissed the suit vide judgment and decree dated 28-2-2002 on the ground that Prabhavati Devi had failed to establish execution of sale-deed dated 4-5-1995 by fraud.

6. Aggrieved, Prabhavati Devi preferred an appeal on 18-3-2002 before the Additional District Judge (F.T.C.), Surajpur. It is not disputed in this appeal that on 10-9-2006 i.e. during the pendency of the appeal, Prabhavati Devi died issueless. On 23-9-2006, an application under Order XXII Rule 3 read with Rule 10 of the C.P.C. was filed by one Kamleshwar Sharan Singh for being impleaded on the ground that Prabhavati Devi had executed a sale-deed of the suit land on 10-3-2003 in his favour and had also executed a will regarding land Kh. No. 656 and other properties. On 13-11-2006 another application under Order XXII Rule 3 of the C.P.C. was filed by one Bharat Singh for being impleaded as an appellant in place of Prabhavati Devi on the basis of a registered will dated 16-6-1995 executed by Prabhavati Devi in favour of Kamleshwar Sharan Singh and Bharat Singh in regard to the suit land. The appellants herein filed a specified reply and denied that Prabhavati Devi had transferred or executed a will in favour of Kamleshwar Sharan Singh and Bharat Singh. No. enquiry as to the execution of will dated 16-6-1995 by Prabhavati Devi as contemplated under Order XXII Rule 5 of the C.P.C. was undertaken by the learned Additional District Judge. On 5-1-2007 the learned Additional District Judge allowed the application under Order XXII Rule 3 of the C.P.C. on the ground that the appellants herein did not aver that besides Kamleshwar Sharan Singh and Bharat Singh, Prabhavati Devi had any another legal representative. Consequently, on the basis of the registered will, it allowed the applications and ordered substitution of Kamleshwar Sharan Singh and Bharat Singh as appellants Ia and Ib as legal representatives of the deceased appellant Prabhavati Devi.

7. On 25-1-2007 one Gulab Singh also moved an application under Order XXII Rule 3 of the C.P.C. for being impleaded as appellant, as the legal heir of late Prabhavati Devi claiming to be the nephew of late Prabhavati Devi. Kamleshwar Sharan Singh and Bharat Singh, who had already been impleaded as appellants resisted the application on the ground that on 16-6-1995 Prabhavati Devi had executed a registered will in their favour and, therefore, after the death of Prabhavati Devi the question of opening of intestate succession did not arise, and therefore, Gulab Singh could not be impleaded as co-appellant. On 19-3-2007

the learned Additional District Judge allowed the application of Gulab Singh for impleadment on the ground that Kamleshwar Sharan Singh and Bharat Singh had not proved the execution of registered will by Prabhavati Devi on 16-6-1995, and therefore, Gulab Singh who was claiming to be the legal representative of Prabhavati Devi should also be impleaded. It was further observed by the learned Additional District Judge in the order that if during hearing of the appeal it transpired that out of Bharat Singh, Kamleshwar Sharan Singh and Gulab Singh anyone had an interest adverse to late Prabhavati Devi, such person would be transposed as respondents in the appeal. Consequently, it ordered substitution of Gulab Singh also as appellant No. 1c.

8. Shri Manoj Paranjpe, learned counsel for the appellants has placed reliance on Jaladi Suguna (Dead) through L.Rs. v. Satya Sai Central Trust and others 2008 AIR SCW 4733, in support of the arguments that in absence of an enquiry as contemplated by Order XXII Rule 5 of the C.P.C. for determining the question as to which of the appellants were entitled to legally represent the estate of the deceased Prabhavati Devi the Judgment and decree passed by the lower appellate Court was a nullity and the matter deserves to be remanded to the lower appellate Court for conducting an enquiry as contemplated by Order XXII Rule 5 of the C.P.C. for determining the question as to between Kamleshwar Sharan Singh and Bharat Singh or Gulab Singh who should be impleaded as the legal representative of the estate of the deceased Prabhavati Devi.

9. On the other hand, Shri Pramod Verma, Learned Senior Advocate for the respondents No. 1-a and 1-b contended that in any case since Kamleshwar Sharan Singh and Bharat Singh who claimed to be the legal representatives of the deceased Prabhavati Devi as testamentary legatees and Gulab Singh who claimed to be the legal heir were impleaded as legal representatives, no prejudice was caused to the appellants, and therefore, the judgment and decree passed by the lower appellate Court would not be a nullity. Learned Senior Advocate distinguished the case law cited by the appellants on the ground that in that case despite an enquiry being conducted and finding being recorded by the trial Court regarding the persons who were the legal representatives of the deceased respondent, the High Court did not order substitution of such persons as legal representatives of the deceased respondent, and therefore, it amounted to appeal being heard against a dead person. On this premise, the Supreme Court had held that entire judgment and decree is nullity and inoperative. In the present case, the trial Court had allowed the impleadment of all the three persons claiming to be legal representatives of Prabhavati Devi.

10. Shri D.N. Prajapati, learned counsel for respondent No. 1-c supported the arguments advanced by learned Senior Advocate for respondents No. 1-a and 1-b.

11. Having heard rival submissions, I have perused the record. It is not in dispute in this appeal that the sole appellant Prabhavati Devi had died issueless. Under Order XXII Rule 3 of the C.P.C. where the sole appellant dies and the right

to sue survives, a duty is cast on the Court, on an application made in that behalf to cause the legal representatives of the deceased appellant to be impleaded as parties and to proceed thereafter with the appeal. A legal representative according to the definition in Section 2(11) of the C.P.C. means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased. Thus a legatee under a will, who intends to represent the estate of the deceased testator, being an intermeddler with the estate of the deceased, will be a legal representative. Order XXII C.P.C. Inter alia deals with the death of parties. Rule 3 relates to procedure in case of death of one of several plaintiffs or the sole plaintiff. Rule 5 relates to determination of question as to legal representative and reads as under:

5. Determination of question as to legal representative.--Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court;

Provided that where such question arises before an Appellate Court, that Court may, before determining the question, direct any subordinate Court to try the question and to return the records together with evidence, if any recorded at such trial, its findings and reasons therefor, and the Appellate Court may take the same into consideration in determining the question.

12. It was observed by the Supreme Court in *Jaladi Suguna* (supra) as under:

10. Filing an application to bring the legal representatives on record, does not amount to bringing the legal representatives on record. When an LR application is filed, the Court should consider it and decide whether the persons named therein as the legal representatives, should be brought on record to represent the estate of the deceased. Until such decision by the Court, the persons claiming to be the legal representatives have no right to represent the estate of the deceased, nor prosecute or defend the case. If there is a dispute as to who is the legal representative, a decision should be rendered on such dispute. Only when the question of legal representative is determined by the Court and such legal representative is brought on record, it can be said that the estate of the deceased is represented. The determination as to who is the legal representative under Order XXII Rule 5 will of course be for the limited purpose of representation of the estate of the deceased, for adjudication of that case. Such determination for such limited purpose will not confer on the person held to be the legal representatives, any right to the property which is the subject matter of the suit, vis-a-vis other rival claimants to the estate of the deceased.

11. The provisions of Rules 4 and 5 of Order XXII are mandatory. When a respondent in an appeal dies, the Court cannot simply say that it will hear all rival claimants to the estate of the deceased respondent and proceed to dispose of the appeal. Nor can it implead all persons claiming to be legal representatives,

as parties to the appeal without deciding who will represent the estate of the deceased, and proceed to hear the appeal on merits. The Court cannot also postpone the decision as to who is the legal representative of the deceased respondent, for being decided along with the appeal on merits. The Code clearly provides that where a question arises as to whether any person is or is not the legal representative of a deceased respondent, such question shall be determined by the Court. The Code also provides that where one of the respondents dies and the right to sue does not survive against the surviving respondents, the Court shall, on an application made in that behalf, cause the legal representatives of the deceased respondent to be made parties, and then proceed with the case. Though Rule 5 does not specifically provide that determination of legal representative should precede, the hearing of the appeal on merits, Rule 4 read with Rule 11 make it clear that the appeal can be heard only after the legal representatives are brought on record.

13. Since Prabhavati Devi who was prosecuting the appeal died during the pendency of the appeal, her legal representatives who succeeded to her estate were required to be brought on record and to be heard in their capacity as persons representing the estate of the deceased Prabhavati Devi. Under Order XXII Rule 5 of the C.P.C., a question as to whether any person is or is not the legal representative of a deceased appellant can be said to have arisen when a person claims to be such legal representative and such averment is denied by the other side. In the present case, the application filed by Kamleshwar Sharan Singh and Bharat under Order XXII Rule 3 of the C.P.C. for impleadment of legal representatives of Prabhavati Devi Singh on the basis of a registered will executed by Prabhavati Devi in their favour on 16-6-1995 was resisted by the appellants herein by specifically denying the execution of will by Prabhavati Devi, and therefore, a question arose as to whether Kamleshwar Sharan Singh and Bharat Singh were entitled to legally represent the estate of the deceased Prabhavati Devi as testamentary legatees on the basis of a registered will dated 16-6-1995. As regards the application filed by Gulab Singh for impleadment, although the appellants herein did not file reply to the said application yet it was resisted by Kamleshwar Sharan Singh and Bharat Singh. In view of the assertion by Kamleshwar Sharan Singh and Bharat Singh that they were entitled to legally represent the estate of the deceased Prabhavati Devi on the basis of registered will, the question whether Gulab Singh was entitled to legally represent the estate of deceased Prabhavati Devi as a legal heir was wholly dependent on the determination of the question whether Kamleshwar Sharan Singh and Bharat Singh were entitled to legally represent the estate of the deceased Prabhavati Devi on the basis of registered will or not. Shri Manoj Paranjpe, learned counsel for the appellants had, during arguments, on instructions, made a specific submission that Gulab Singh was not the nephew of Prabhavati Devi. If after enquiry the Court would come to a conclusion that as testamentary legatees Kamleshwar Sharan Singh and Bharat Singh were entitled to legally represent the estate of the deceased Prabhavati Devi, the question of impleadment of

Gulab Singh as legal representative of the estate of the deceased Prabhavati Devi as a legal heir would fall to the ground. In case after enquiry the Court would come to the conclusion that neither of the parties were entitled to legally represent the estate of the deceased, the appeal would abate.

14. It is also pertinent to note that the appellants herein had specifically denied the execution of will be Prabhavati Devi in favour of Kamleshwar Sharan Singh and Bharat Singh, and therefore, a question arose whether Kamleshwar Sharan Singh and Bharat Singh were or were not the legal representatives of the deceased appellant Prabhavati Devi. The determination of such question contemplates an enquiry though of a summary nature by the Court by allowing the parties to lead evidence on the said question. In this view of the matter, the appeal is allowed. The second question of law is answered in the affirmative. The order dated 5-1-2007 and the order dated 19-3-2007 as also the judgment and decree dated 24-4-2007 passed by the lower appellate Court in Civil Appeal No. 6-A/2007 are set aside and the matter is remanded to the lower appellate Court for holding a summary enquiry as contemplated by Order XXII Rule 5 of the C.P.C. for deciding the question whether Kamleshwar Sharan Singh and Bharat Singh or Gulab Singh or any or them were entitled to legally represent the estate of the deceased Prabhavati Devi and to be substituted as legal representatives in the appeal. After determination of such question, the lower appellate Court shall pass an appropriate speaking order on the applications under Order XXII Rule 3 C.P.C. filed by Kamleshwar Sharan Singh and Bharat Singh and also Gulab Singh and shall thereafter proceed to hear and decide the appeal afresh in accordance with law. In this view of the matter, it is not necessary for me to dwell on the first question of law. No order as to costs. Parties shall appear before the lower appellate Court on 15-10-2008.