
(1924) 08 BOM CK 0027
In the Bombay High Court

Shankerbhai Manorbhai Patel and Another	APPELLANT
Vs	
Motilal Ramdas Shah and Another	RESPONDENT

Date of Decision : 15-08-1924

Acts Referred:

Citation : (1925) ILR (Bom) 118

Hon'ble Judges : Lallubhai Shah, J;Fawcett, J

Bench : Division Bench

Judgement

Lallubhai Shah, Kt., Acting C.J.

1. In this case the plaintiffs sued to recover possession of a certain house-site from the defendants. The plaintiffs were uncle and nephew and claimed the land as tenants-in-common. The nephew (plaintiff No. 2) died during the pendency of the suit and his widow was joined as his legal representative. "The trial Court passed a decree in their favour on April 8, 1919.

2. The defendants appealed to the District Court. During the pendency of the appeal, the respondent No. 2, Bai Chanchal, the widow of the nephew, died in November 1919. No steps were taken to bring the legal representative of the deceased respondent on the record up to March 1921, when, an application was made by the appellants to the effect that the surviving respondent No. 1 was the heir and that the appeal could go on against him without any other person being brought on the record in place of the respondent No. 2. This application was opposed on the ground that the proper heir would be Bai Jekore, the sister of Bai Chanchal's husband: and that as she was not brought on the record the appeal abated as regards respondent No. 2. The learned Assistant Judge held that the appeal abated as regards respondent No. 2, and further held that in consequence thereof the appeal abated as regards respondent No. 1 also. He was of opinion that the shares of the co-owners not being ascertained any decree that may be passed against) respondent No. 1 on hearing the appeal would be infructuous, as the decree of the trial Court in favour of respondent No. 2 would stand in any case.

3. The appellants apparently did not apply to the lower appellate Court to set aside the abatement and to bring Bai Jekore on the record as the legal representative of respondent No. 2 under Order XXII, Rule 9, Sub-rule (2), as they could have and should have done when their application to treat the respondent No. 1 as the heir of respondent No. 2 was disallowed.

4. The defendants have appealed to this Court. They have joined Bai Jekore as a party respondent to the appeal.

5. It is clear that the order treating the appeal as having abated as to respondent No. 1 is wrong. Under Rule 4, Sub-rule (3) read with Section 107(2) of the Code, the appeal would abate as against the deceased respondent only. The words "as against the deceased defendant" have been added in the Code of 1908 and give effect to the view which was taken by this Court under the Code of 1882. In *Chandarsang v. Khimabhai* (1897) 22 Bom. 718 it was held by this Court with reference to Section 368 of the Code of 1882 that as regards the deceased respondent the Court ought to have proceeded u/s 368 and declared that the appeal had abated as to him and proceeded against the other respondents or else to have directed that the legal representative of the deceased respondent should be placed on the record. In that case the suit was of the same nature as the present suit. Under the present Code the position is made clear and it is open to the Court either to hear the appeal as regards respondent No. 1 only or to set aside the abatement under Rule 9 of Order XXII and then to hear it as regards both the respondents. No doubt a difficulty may arise, when the abatement is not set aside under Rule 9, and the relief which the Court can grant as against the other respondents in appeal is not likely to be effective. That difficulty must depend largely upon the nature of the suit, and the possible relief that can be granted in appeal under the circumstances of the particular case. The decision in *Raj Chunder Sen v. Ganga Das Seal* (1904) 31 Cal. 487 upon which the learned Assistant Judge has relied, has reference to a decree that was passed in a partnership suit and the observations of their Lordships of the Privy Council have relation to the nature of the suit and to the terms of Section 368 of the Code, 1882.

6. The view taken by the Calcutta High Court that in such suits by co-owners practically the appeal abates as a whole if it abates with reference to one of the respondents conflicts with the view taken by this Court in *Chandarsang v. Khimabhai* (1897) 22 Bom. 718 and does not appear to me to be consistent with the words used in Sub-rule (3) of Rule 4.

7. Speaking with reference to the nature of the suit here, I am not at all satisfied that it may not be a matter of real advantage to the appellant to get rid of the decree against them at least as regards respondent No. 1. Their right to have the appeal heard on the merits as regards this respondent is clear: and I am unable to accept the view that because the appeal has abated as regards respondent No. 2 it must be taken to abate as regards respondent No. 1 or that it could not be heard on the merits as regards him.

8. In this case Bai Jekore has been joined as respondent No. 2, but for the appellants it is conceded that the abatement as regards that respondent stands, as no application for setting it aside has been made.

9. As regards respondent No. 1, it seems to me that the appeal must be heard on the merits; and if the Court is satisfied that the plaintiffs' case is not proved it will be open to the Court to dismiss it as regards plaintiff No. 1. It is not necessary at this stage to consider exactly what the effect of such an order would be on the decree, which as now passed by the trial Court would stand as regards plaintiff No. 2; nor is it necessary to, consider what decree the lower appellate Court will pass under its powers after hearing the appeal on the merits. It is enough for our present purposes to point out that if the defendants succeed, it would place them in a more advantageous position in so far as they would have then to satisfy the plaintiff No. 2 only with reference to the decree and not the plaintiff No. 1. That is an advantage which there is no valid reason in law to deprive them of simply because the appeal has abated as to one of the respondents.

10. It is possible for the Court to exercise its inherent powers in the interests of justice under such circumstances, as pointed out in *Lakhmichand Rewachand v. Kachubhai Gulabchand* (1911) 35 Bom., 393. In the present case, though the legal representative of respondent No. 2 in the lower appellate Court is now before us, we do not consider it proper to make any order in the exercise of such powers. The appellants made no application in the lower appellate Court under Rule 9(2) of Order XXII and before us they, have accepted the abatement of the appeal as regards respondent No. 2 as an indisputable fact in the case.

11. I would, therefore, allow the appeal against respondent No. 1, reverse the order of the lower appellate Court relating to him, and remand the appeal to that Court for disposal according to law,

12. Appellants to get their costs of the appeal here from respondent No. 1 and to pay the costs of respondent No. 2.

Fawcett, J.

13. As the plaintiffs were tenants-in-com mon, I think that under Order XXII, Rules 4 and 11, the legal representative of the deceased respondent should have been added as a party by an application made within proper time under Sub-rule (1) of Rule 4. But under Sub-rule (3) the omission to do so only has the effect of making the appeal abate as against the deceased respondent. This is, I think, a clear indication of the intention of the Legislature that the appeal should not in such a case necessarily, or even ordinarily, abate as a whole. The Privy Council decision in *Raj Chunder Sen v. Ganga Das Seal* (1904) 31 Cal. 487 was based on Section 368 of the CPC of 1882, which said that the suit; should abate, without the addition of the words "as against the deceased defendant", which is made in the Code of 1908.

14. Inasmuch as the appeal primarily abates only against the deceased respondent, there is still an appeal pending against the remaining respondent, and under Order XLI, Rules 13 and 16, the appellant (unless the appeal is dismissed under Rule 11) is entitled to a normal hearing and decision.

15. The remaining respondent can of course raise a preliminary objection that the appeal is not maintainable against him alone; and this was successfully done in the present case. The main reasons for the Assistant Judge's view are given in paragraph 4 of his judgment, which says:

In the present case, the shares of respondent No. 1 and of the deceased Chanchal in the plaint property were not ascertained. They were held joint sharers so that, if the present appeal were allowed, that order would not be binding against the representatives of Chanchal. So, there would be the anomalous position that the decree would bind one sharer and not the other. This, coupled with the fact that the shares of these sharers were not ascertained, would make the order of this Court infructuous.

16. This follows the view taken by the Calcutta High Court that, in a case like the present, where the plaintiffs are joint owners, the necessary result is that the whole appeal abates, because the Court should not be called upon to make two contradictory decrees in the same litigation, which would be the result of allowing the appeal as against the remaining respondent, and not disturbing the decree of the lower Court as against the deceased respondent (cf. *Kali Dayal Bhattacharjee v. Nagendra Nath Pakrashi* (1919) 24 C.W.N. 44).

17. But this view has not apparently been endorsed by this Court, and the decision in *Chandarsang v. Khimabhai* (1897) 22 Bom. 718 is against it, though the point is not discussed.

18. I agree with my learned brother that it is not a necessary consequence in every such case that the whole appeal abates. In the present case, for instance, supposing the defendants succeed in their appeal on the merits, I do not think (though I speak with some diffidence, as the point has not been argued, and is not really before us at the present stage) that the result will be so, anomalous or inconvenient that the Court should merely on that account refuse to pass a decree in favour of the defendants as against the respondent No. 1. The result will be that defendants fail as regards plaintiff No. 2's share but succeed as to plaintiff No. 1's. The lower Court's order could in the circumstances be modified by (1) directing that defendants do put plaintiff No. 2 in joint possession of the property; (2) dismissing the suit as regards plaintiff No. 1's share; and (3) passing an equitable order as to costs. The appellate Court has, I think, power to pass such a decree as being one "such as the case may require" under Order XLI, Rule 33, Civil Procedure Code. This covers a variance of a decree under appeal, not only for error, but also on grounds which have come into existence since it was passed: see *Sakharam Mahadev Dange v. Hari Krishna Dange* (1881) 6 Bom. 113; *Rustomji v. Sheth Purshotamdas* (1901) 25 Bom. 606 ; *Kanakayya*

v. Janardhana Padhi (1910) 36 Mad. 439 ; and Muthuswami Ayyar v. Kalyani Ammal (1916) 40 Mad. 818 .

19. If plaintiffs in the trial Court had succeeded only regarding plaintiff No. 2's share, the Court could have passed a decree for joint possession in favour of plaintiff No. 2; (cf. Parashram v. Miraji (1895) 20 Bom. 569 and Naranbhai v. Ranchod (1901) 26 Bom. 141). There was no necessity for a distinct issue regarding joint; possession in the circumstances of this case.

20. The above remarks, however, will not in any way bind the lower Court which will have to decide all the questions arising after hearing arguments on them.

21. I concur in the order proposed by my learned brother.