
(1942) 02 AHC CK 0026
In the Allahabad High Court
Case No : First Appeal No. 362 of 1935

Sheikh Mohammad Hammad and Others	APPELLANT
Vs	
Tej Narain Lal Alias Tej Bahadur Lal and Another	RESPONDENT

Date of Decision : 17-02-1942

Acts Referred:

Citation : (1942) 02 AHC CK 0026

Final Decision : Dismissed

Judgement

Allsop, J.—The property in suit originally belonged to one Daulat Prasad and was transferred after his death by his widow Mt. Janki Kuer by means of two deeds of mortgage executed in the year 1902. The mortgage brought a suit on the basis of his mortgages and obtained a decree for sale of the property. The property was put to sale and was purchased by Nazir Husain in the year 1918. After the death of Mt. Janki Kuer in that same year a suit was instituted in the year 1920 by Harnandan Lal and Raghunandan Lal who were admittedly the reversioners to the estate of Daulat Prasad. They impleaded the mortgagee from Mt. Janki Kuer and Nazir Husain the purchaser of the property. Their suit for possession was dismissed. They appealed and during the course of the appeal they both died. One of them left no issue and the other left him surviving his son, the present defendant, Tej Narain Lal. Tej Narain Lal was impleaded as the plaintiff appellant in place of Harnandan Lal and Raghunandan Lal and he eventually succeeded in his appeal, obtained a decree for possession on the condition that he should pay a sum of money, paid the money and took possession of the property in suit. We now come to the facts which have given rise to the controversy in the suit with which we are dealing. Nazir Husain also died during the pendency of the appeal and his eldest son, Zainul Ebad, was impleaded as his representative in interest. The decree obtained by Tej Narain Lal was thus a decree against Zainul Ebad alone according to the record. Nazir Husain left him surviving besides Zainul Ebad, a widow Mt. Sharafat Bibi, another son Mohammad Hammad and four daughters. It is the widow and Mohammad Hammad and the four daughters who are the plaintiffs appellants in the appeal before us. They sought possession of

the property upon the allegation that the suit instituted by Raghunandan Lal and Harnandan Lal against Nazir Husain had been dismissed as against Nazir Husain and that the decision in the appeal was not binding upon them because they were not impleaded as the representatives in interest of Nazir Husain. The learned Judge of the trial Court has dismissed the suit upon two grounds. He has referred to the fact that there was a dispute between Nazir Husain's two brothers, Mushir Husain Qidwal and Maqbul Husain, and the present plaintiff Mohammad Hammad, on the one side and Zainul Ebad on the other side, that this controversy was referred to arbitration and that by the award it appeared that none of the plaintiffs had any interest in the property in suit. We agree with the learned Judge of the trial Court that the effect of the arbitration award was to destroy any claim that Mohammad Hammad might have to the property in suit because the decision was that certain property belonging to Nazir Husain should pass to him, certain other property to Zainul Ebad and the remainder to Mushir Husain and Maqbul Husain and the property in suit is not included in the property which was awarded to him. On the other hand, we cannot see how this award can have any effect on the rights of Nazir Husain's widow and his daughters who were not parties to the dispute or to the reference to arbitration. The other ground upon which the learned Judge has dismissed the suit is that Zainul Ebad was appointed by the Court to represent the interests of Nazir Husain after the latter's death during the pendency of the appeal which resulted in a decree for possession in favour of Tej Narain Lal, and that Zainul Ebad represented the estate of Nazir Husain and the decree passed against him was binding upon all those who claimed the property through Nazir Husain. We have come to the conclusion that the decision of the learned Judge of the Court below upon this point is correct.

2. We need refer only to three decisions which seem to us to conclude the point. The first of these is the case in 26 Mad. 230.¹ In that case a suit for sale on the basis of a mortgage was instituted against a certain person who died in the course of the proceedings. After his death, one of his heirs alone was impleaded as his representative and a decree for sale was passed. The plaintiff purchased the property himself in execution of the decree. Thereafter, the heirs who had not been impleaded as the representatives of the mortgagor dispossessed the plaintiff and he was compelled to bring a suit for possession. It was held in these circumstances that one heir had been appointed as the representative of the interests of the deceased by an order of the Court and that the decree passed against him in the suit for sale was binding upon the other heirs of the, deceased mortgagor. There is a similar decision in A.I.E. 1924 Bom. 420.² Finally, we may refer to the case in 50 All. 857.³ In that case it was held that an appeal did not abate against heirs who had not been impleaded as representatives of one of the deceased parties when other heirs had been so impleaded. Learned counsel for the appellant has argued that this decision is not strictly in point because it does not deal with any question of *res judicata*. It seems to us however that the plaintiffs, in order to succeed, are driven into the position that the original decree

dismissing the suit of Raghunandan Lal and Harnandan Lal is binding in so far as their shares in the property are concerned and they can maintain that position only by saying that that decree is binding because the appeal against it abated in so far as they are concerned. In our judgment the ruling which we have quoted precludes them from putting forward an argument of this nature.

3. Learned counsel for the appellant has not been able to produce any distinct rulings on the question whether a person appointed as the legal representative of a deceased party in a suit sufficiently represents all others who may be interested in the property as claimants through the deceased. He has referred us to the case in 1936 A.L.J. 6224 It seems to us however that that case does not deal with the question which is before us. Under the provisions of O. 22, E. 4 of Sch. 1, Civil P.C., a representative is to be appointed in place of a deceased party to a proceeding. Under E. 5 of that order it is for the Court to decide who the proper representative is if there is a dispute upon the question. It was held in the case in 1936 A.L.J. 6224 mentioned above that an order passed under O. 22, R. 5 that a certain person was the representative of a deceased party did not operate as *res judicata* when the question arose in a subsequent suit which of the claimants was the person really entitled to succeed to other property. That is not the question which we have to consider in this case. We have no doubt if the question arose in respect of some other pro-

1. Kadir Mohideen Marakkayar Vs. Muthukrishna Aiyar and Another,

2 Jehrabi Sadullakhan Mokasi Vs. Bismillabi Sadruddin Kaji,

3 Muhammad Zafaryab Khan Vs. Abdul Razzac Khan and Others,

4 Antu Rai and Others Vs. Ram Kinkar Rai and Another,

4. perty whether the plaintiffs were or were not entitled to a share in the estate of Nazir Husain that the order of the Court that Zainul Ebad should represent him in Raghunandan Lal's and Harnandan Lal's appeal would not operate as *res judicata*. The situation with which we have to deal is a different one. The question is whether Zainul Ebad having been appointed by the Court to represent Nazir Husain in the appeal arising out of the suit of Raghunandan Lal and Harnandan Lal did not in that suit represent all those who claimed the property which was in issue in that suit as the heirs of Nazir Husain. If he was their representative then the decree passed in that suit is binding upon them as much as it is upon him and we think that the authorities which we have quoted establish beyond all doubt that Zainul Ebad was the representative of all who demand through Nazir Husain in that appeal. There is one other authority to which we may refer in Dip Narain Rai Vs. Lachhman Upadhiya and Others,

5. Learned counsel for the appellants has suggested that the rules of Mahomedan law are such that no individual Mahomedan can represent others so as to bind them in the course of litigation. It is of course true that Mahomedan heirs succeed to separate shares in an estate and it is doubtless true that in the

ordinary course a person litigating about the share of one of them could not produce any effect on the share of another who was not impleaded but those are not propositions which affect the decision of this appeal. Raghunandan Lal and Harnandan Lal instituted their suit against Nazir Husain and the death of the latter did not change the nature of the claim so that it became a number of separate but connected claims against the various heirs. Zainul Ebad was not impleaded as the owner of a share in his own right but in a representative capacity as the person best suited to uphold the interests of Nazir Husain's estate. Learned counsel has referred to the case in 40 Mad, 243,6 but that was a case where one brother sued to redeem a mortgage when he had succeeded to a share in the equity of redemption and it was held that the decree passed against him could not bind another brother who was a minor at the time and who was not represented in the suit and it is to be observed that this was not a case in which the original holder of the property had been a party and had died in the course of litigation; that case carries us no further.

6. Reference has also been made to the cases in AIR 1938 169 (Privy Council) , Manni Gir Vs. Amar Jati Chela and Another, and Phool Chand and Others Vs. Mt. Mantia and Others but these again are cases which are authority only for the proposition that Mahomedans succeed to separate shares. They are not cases where any question arose of an order passed

5. Dip Narain Rai Vs. Lachhman Upadhiya and Others,

6. Abdul Majeeth Khan sahib Vs. C. Krishnamachariar,

7. AIR 1938 169 (Privy Council)

8 Manni Gir Vs. Amar Jati Chela and Another,

9 Sukur Mahamed Vs. Asmot Mandal,

10 Phool Chand and Others Vs. Mt. Mantia and Others

7. under E. 4 or E. 5 of O. 22 of Sch. 1, Civil P.C We may mention that the case in 26 Mad. 2301 and the case in 50 All, 8573 were cases in which Mahomedans were concerned. We are satisfied that the decision of the Court below is right that Zainul Ebad sufficiently represented the interests of the present plaintiffs in the appeal arising out of the suit instituted by Raghunandan Lal and Harnandan Lal against Nazir Husain and that the decision in that suit prevents them now from obtaining a decree for possession of the property as against Tej Narain Lal. The result is that we dismiss the appeal with; costs. Appeal dismissed.