

(1934) 08 PAT CK 0032

In the Patna High Court

Sita Ram Singh

APPELLANT

Vs

Suraj Sinha

RESPONDENT

Date of Decision : 08-08-1934

Acts Referred:

Bengal Tenancy Act, 1885 — Section 49

Citation : AIR 1934 Patna 559

Hon'ble Judges : Varma, J

Bench : Division Bench

Judgement

Varma, J.—This second appeal arises out of a suit for ejectment of the defendants-respondents from plot No. 266 recorded in Shikmi khata No. 12 appertaining to kaimi khata No. 214 of mauza Sitab Diara in tola Rameshar Singh. The plaintiff, appellant claimed to be the Kashtkar of the plot along with his brother who was a co-plaintiff and after having served notice u/s 49, Ben. Ten. Act on the defendants, he with his brother filed the present suit for recovery of khas possession together with mesne profits on the defendants' refusal to give up possession. Defendant 1 alone contested the suit and filed a written statement.

In the trial Court various issues were framed on the pleadings including that of the maintainability of the suit. The ground taken was that the minor son of one of the plaintiffs who died during the pendency of the suit should have been brought on the record within time.

2. The learned Munsif disallowed the objection on the ground that it was not necessary to have the minor son on the record when the karta of the family was already there, and he decreed the suit. On appeal by the defendants, the suit was remanded to the trial Court for a finding as to whether the plaintiff Raj Kishor Singh who was dead had left behind a son. The learned Munsif tried the issue and remitted his finding to the lower appellate Court that the existence of any son of the deceased plaintiff was not proved. The learned District Judge agreed with the finding of the Munsif but he has held that the remaining plaintiff

has got sons and, as the right to sue did not survive to him alone, it was necessary to bring on record the sons of the surviving plaintiff in substitution of the deceased plaintiff, and this not having been done he has held that the suit had abated, applying the principle laid down in *Basist Narayan Singh v. Modnath Das*, 1928 Pat 250.

3. No other point was pressed before the learned District Judge and he dismissed the suit. In second appeal it has been argued before me that the learned District Judge was wrong in holding that the suit had abated when the present appellant represented the estate of the deceased plaintiff, and that the principle laid down in the case of *Basist Narayan Singh v. Modnath Das*, 1928 Pat 250 was not applicable to the present case.

Now, it appears that on 12th August 1930, a petition was filed before the Munsif on behalf of the present appellant that plaintiff 1, Raj Kishor Singh was dead and that the suit be proceeded with in the name of plaintiff 2 (the appellant) alone as he was the karta of the joint family and had in him the full power to sue the defendants.

4. On reference to the order sheet it appears that the prayer was allowed and no objection was taken to it. The Munsif's order No. 30 runs as follows: "plaintiff 2 applies to be substituted in place of the deceased plaintiff 1. Order Allowed." It cannot therefore be said that the appellant failed to bring to the notice of the Court the fact of the death of his brother who was a co-plaintiff with him. The two brothers together applied for the ejectment of the defendants. The minor sons of the surviving plaintiff were not amongst the plaintiffs. When one of the brothers died, his interest in the suit devolved on the other brother, who was the karta of the joint family, the deceased brother having left behind no son of his own.

5. The facts of the case of *Basist Narayan Singh v. Modnath Das*, 1928 Pat 250 relied upon by the learned District Judge are distinguishable from the facts of the present case. In that case the plaintiffs sued for specific performance of a contract, The Subordinate Judge dismissed the suit and the plaintiffs came in appeal to the High Court. The appeal came on for hearing on 10th May 1927 when it was represented that two of the defendants-second party-respondents were dead. An application was made to the Court for adjournment of the case in order to enable the appellants to bring the heirs of the deceased respondents on the record. The hearing was accordingly adjourned for a fortnight and at the same time it was remarked that the surviving respondent, brother of the deceased respondents, was on the record but it did not appear that the three brothers were members of a joint family or not and, that if it should appear that they were members of the same joint family, then it would be necessary to substitute the heirs although a note would have to be made in the record on the appeal that the two respondents were dead and that their interests had survived to the remaining respondent.

6. Subsequently an application was made on behalf of the appellants that the three respondents were brothers and members of a joint Hindu family and that the surviving respondent was the karta of the family and was already on the record and it was therefore prayed that the fact of the death of the two respondents be noted and that the appellants be permitted to prosecute the appeal. This application was placed before the registrar on 31st May 1927, and the registrar directed that a note be made on the record that the deceased respondents had died in a state of jointness with the surviving respondent and that their interest had survived to the remaining respondent. When the appeal finally came on for hearing before the Bench it was urged that the appeal had abated "inasmuch as none of the heirs of the deceased respondents had been substituted within the period of limitation."

7. It appeared that one of the respondents died on 11th December 1924 and another on 1st March 1927. The appellants contended in a petition filed on 7th December 1927, that the fact of the death of the respondents was brought to the notice of the appellants' vakil for the first time when the case was on the daily list, but that as respondents second-party were members of a joint family no application for substitution was made. They further contended that no application for substitution was necessary, and that if it was held necessary it was prayed that the abatement be set aside and the persons named in the petition be added as party respondents. Kulwant Sahay, J., in delivering the judgment of the Court held that the observation made by this Court in the order of 10th May 1927, to the effect that no substitution would be necessary if the surviving respondent was a member of the joint family was evidently made on the supposition that the said respondent was the sole surviving member of the family and that it was not represented to the Court that there were other surviving members of the family and the appellants could derive no benefit from the said observation referring to the provisions of Sub-rule (3). Rule 4, Order 22, Civil P.C., his Lordship held that the appeal had abated on account of the appellants' failure to make an application for substitution of the heirs of the deceased respondents within the time limited by law and further, that in the circumstances of the particular case the plaintiffs appellants could not proceed with the suit.

8. It was further held in that case that there was no ground to extend the time to make an application for substitution.

The position is different in this case Two of the recorded kashtkars, the present appellant and his brother filed the suit for ejectment of the defendants. One of the brothers died leaving no son. The other brother had sons but they were not plaintiffs in the suit. An application was made to the Court by the surviving brother to be allowed to continue the suit on the ground that he was the karta of the joint family and had power to proceed with the suit. The petition was treated as a petition for substitution (although the word "substitution" does not specifically occur in it) and the prayer was granted by the Munsif. According to the plaint the two brothers jointly represented the family and on the death of one

of the brothers the right to sue the defendants survived to the other brother. As stated above, in the case relied upon by the learned District Judge no petition for substitution was filed within time, and on the death of the two respondents, in the circumstances of the case, a right to proceed with the matter against the surviving respondent did not subsist in the appellants.

9. In this case no question was raised in the Courts below on the petition of 12th August 1930, about substitution being time-barred and it is not necessary to go into that matter. But even if necessary, I find that in his deposition given on 26th November 1930, the present appellant stated that his brother died five or six months ago, and therefore accepting the longest period of six months it would appear that the application for substitution was well within time. The present case is clearly governed by the provisions of Order 22, Rule 2, Civil P.C. I am therefore of opinion that the decision relied upon by the learned District Judge does not apply to the facts of the present case and that this is not a case of abatement. In the case of Sheo Shankar Ram v. Jaddo Kunwar, 1914 PC 186 it was clearly pointed out by the Judicial Committee that there were occasions when the managers of joint Hindu family so effectively represented all other members of the family that the family as a whole was bound.

10. It cannot be said in this case that the sons of the present appellant who continued the suit as the karta of the joint family will not be bound by his action.

I have come across two cases in which under similar circumstances it has been held by this Court that there was no abatement: See Jainarayan Ojha v. Hira Ojha 1933 Pat 464 and an unreported decision of the Court in Second Appeal No. 1331 of Mathura Prasad Singh v. Karman Sahu Second Appeal No. 1331 of 1930. Relying on the former decision, it was held in the latter case by James and Fazl Ali, JJ., that if the right to sue survived to the surviving plaintiff, then the case was covered by the provisions of Order 22, Rule 2 of the Code. In the present case also the right to sue survived to the appellant as the karta of the family. In the result I allow this appeal, set aside the order of the learned District Judge and remand the case to the lower appellate Court to be disposed of on merits. Costs will abide the result.