
(1986) 07 RAJ CK 0045
In the Rajasthan High Court
Case No : Second Appeal No. 100 of 1974

Smt. Bhonri and Others

APPELLANT

Vs

Shambhu Nath and Others

RESPONDENT

Date of Decision : 09-07-1986

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 4

Citation : AIR 1987 Raj 180 : (1986) 2 WLN 653

Hon'ble Judges : G.N. Bhargava, J

Bench : Single Bench

Advocate : R.S. Kejriwal, for the Appellant; V.B. Sharma and M.M. Rajan, for the Respondent

Final Decision : Dismissed

Judgement

G.N. Bhargava, J.—This is a defendant's second appeal against the judgment and decree passed by the Additional District Judge No. 2, Jaipur City, dismissing the appeal and confirming the judgment and decree passed by the Munsif Jaipur City (East).

2. It is not necessary to deal with the facts of the case except saying that the trial Court by its judgment dated 24-9-71 decreed the suit of the plaintiff Bholanath, for possession, demolition and perpetual injunction.

3. Bholanath expired on 5-10-71. The defendant, Pooranmal feeling himself aggrieved from the judgment of the trial court, preferred an appeal before the District Judge, Jaipur City, Jaipur, impleading Shambhunath, Laxmidevi, and Poonadevi ; son, widow, and daughter, respectively of Bholanath (plaintiff) as respondents. The appeal was filed on 3-12-71. On 10-5-72, one of the respondents, Sambhunath, filed an application stating that all the legal representatives of Bholanath have not been brought on record, and Sitadevi, Deviprasad, Dhruvprasad and Tikku (sons and daughters) of pre-deceased daughter of Bholanath have not been brought on record within 90 days of death

of Bholanath and, therefore, the appeal has abated as a whole, since the decree is for possession and is not indivisible. Copy of this application was received by the learned counsel for the defendant on 10-5-72 and the case was being adjourned for service on the other respondents.

4. It was only on 3-9-73 that the appellant filed an application under Order 41, Rule 20. C.P.C. read with O. 22, Rule 3 and Rule 4, and Section 151. C.P.C., stating that the legal representatives of Bholanath who, have been brought on record and impleaded as respondents, are entitled to continue, and the appeal does not abate merely because, other legal representatives have not been impleaded as party and the appellant was not aware that there were some other legal representatives of Bholanath also, and, therefore, they were not impleaded; Another reason given in the application for not impleading other legal representatives was that Sambhunath, himself, in another case, pending in the Court of Additional Munsif No. 1, has submitted an application that the whole of the property of Bholanath has devolved on Shambhunath. being Karta of Hindu undivided family. But, to avoid any controversy he pleaded that Deviprasad, Sitadevi, Dhruvprasad and Tikku may be impleaded as party.

5. The learned Additional District Judge No. 2, Jaipur City by his judgment dated 5-9-73 dismissed the appeal as being not competent and not able to proceed, in the absence of remaining heirs as he found that, the remaining heirs were necessary parties and not impleading them in appeal was fatal, and since the decree was indivisible, the appeal must abate as a whole.

6. It is against this judgment and decree that the present second appeal has been filed.

7. Shri R. S. Kejriwal, the learned counsel for the appellants, has very vehemently argued that the judgment of the first appellate court is erroneous; the appeal was filed within time; wherein some of the legal representatives have been impleaded. Merely because some legal representatives were not impleaded in appeal, the appeal does not abate as a whole.

8. Shri Kejriwal has not disputed before me that the decree being of possession was indivisible; the remaining legal representatives were necessary parties; and they should have been impleaded in appeal being legal representatives of the plaintiff-Bholanath.

9. The main contention of Shri Kejriwal is that since Bholanath's some legal representatives were impleaded it was sufficient representation and the appeal does not abate; and the first appellate Court should not have dismissed the appeal on this ground and should have allowed to bring other legal representatives on record. In support of this contention, Shri Kejriwal has placed reliance upon the following decisions :

1. Shop of Battu Ramiah Lachayya Vs. Rechintala Veeriah and Others,
2. Daya Ram and Others Vs. Shyam Sundari,

3. Dolai Maliko v. Krushna Chandra Patnaik AIR 1967 SC 40);
4. Mahabir Prasad Vs. Jage Ram and Others,
5. Fakira and Another Vs. Board of Revenue for Rajasthan at Ajmer and Others,
6. Surinder Mohan v. Pyarelal 1979 Raj LW 591;
7. Bhagwan Swaroop and Others Vs. Mool Chand and Others, : Bhagwan Swaroop and Others Vs. Mool Chand and Others,
8. O.P. Kathpalia Vs. Lakhmir Singh (Dead) and Others, ; and
9. Sital Prasad Saxena (Dead) by Lrs. Vs. Union of India (UOI) and Others,
10. On the other hand, Shri V. B. Sharma assisted by Shri M. M. Ranjan, the learned counsel for the respondent, has submitted that Order 22, C.P.C., applies only when a party dies during the pendency of the litigation, i.e. when the matter is pending in any Court of law, and since Bholanath, in the instant case, had died on 5-10-71 when no proceedings were pending, and the trial court had already decreed the suit on 24-9-71, the appeal against that decree had also not been filed; the case is not governed by Order 22, C.P.C.
11. Shri Sharma submitted that the appellant should have impleaded all the legal representatives of Bholanath and if he failed to implead some of the legal representatives, the appeal, itself, was incompetent and the decree had become final so far as other legal representatives of Bholanath who were not impleaded were concerned. According to him, Section 153, C.P.C. will be applicable and a party could be added to the appeal only if it was within limitation as enjoined by Order 1, Rule 10(5), C.P.C. Shri Sharma further submitted that Shambhunath (respondent No. 1) had brought to the notice of the appellant by way of application dated 10-5-72 that some of the legal representatives who were necessary parties, have not been impleaded but. the appellant moved application for impleading them as late as on 3-9-73 and no sufficient cause has been shown as to why the application was moved so late. Moreover, there is no application u/s 5 of the Limitation Act to condone the delay in making application to implead those legal representatives as party.
12. Shri Sharma, in support of his above contention, relied upon the decision of Patna High Court in Jagarnath Raut Vs. Commissioners of Buxar Municipality and Others, wherein it has been held that Section 153, C.P.C. enables the Court to allow amendment in plaint within a period of limitation, upon the application of the plaintiff to implead legal representatives as party provided the suit is not barred by limitation against legal representatives on the date of the application.
13. Shri Sharma has further submitted that the respondents impleaded in the appeal cannot amount to sufficient representation as the remaining legal representatives being sons and daughters of pre-deceased daughter belong to a different family, altogether.

14. Shri Sharma has placed reliance upon the decision of this Court in Ramjeewan Vs. Chand Mohammed, Bhanwarlal Vs. Bhulibai and Others, and that of Allahabad High Court in Girja Shanker Singh and Others Vs. Ram Singh and Others,

15. I have given my thoughtful consideration to the whole matter and have also perused the various authorities cited at the bar, and the judgment of the first appellate court. In view of the latest pronouncements of the Apex Court in Sital Prasad Saxena (Dead) by Lrs. Vs. Union of India (UOI) and Others, and Bhagwan Swaroop and Others Vs. Mool Chand and Others, it cannot be disputed that if the estate has got sufficient representation and even if one of the legal representatives of the deceased is on record, suit or appeal will not abate, and the party should be allowed to bring other legal representatives on record and the rigor of Order 22, C.P.C., has been curtailed to some extent. None of the authorities cited by either party relate to a matter in which death of the party occurred when the matter was not pending in the court as in the instant case, the suit was decreed on 24-9-71 and the appeal was filed on 3-12-71 whereas sole plaintiff-Bholanath died on 5-10-71 when neither the suit was pending nor the appeal had been instituted and, therefore, in my humble opinion, Order 22, C.P.C., has no application to the present case.

16. Section 153, C.P.C. provides that the Court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any "proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceedings.

17. Order 1, Rule 10, C.P.C., provides that, where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, the Court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the Court thinks just.

18. Sub-rule (5) of Rule 10 of Order 1, C.P.C., provides that subject to the provisions of the Limitation Act, 1877, Section 22, the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons.

19. Shri Kejriwal has drawn my attention to Order 1, Rule 9, C.P.C., which provides that no suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. A proviso to Rule 9, C.P.C., was added by C.P.C (Amendment) Act, 1976, that, nothing in this rule shall apply to non-joinder of a necessary party.

20. It is no doubt true that a Code of procedure "is designed to facilitate justice

and further its ends and it is not a penal enactment for punishment and penally and not a thing designed to trip people up". Procedural laws are no doubt devised and enacted for the purposes of advancing justice. Procedural laws, however, are also laws and are enacted to be obeyed and implemented. The laws of procedure by themselves do not create any impediment or obstruction in the matter of doing justice to the parties.

21. The main purpose and object of enacting procedural laws is to see that justice is done to the parties. In the absence of procedural laws regulating procedure as to dealing with any dispute between the parties, the cause of justice suffers and justice will be in a state of confusion and quandary. Difficulties arise when parties are at default in complying with the laws of procedure. As procedure is aptly described to be the handmaid of justice, the Court may in appropriate cases ignore or excuse a mere irregularity in the observance of the procedural law in the larger interest of justice. It is always to be borne in mind that procedural laws are as valid as any other law and are enacted to be observed and have not been enacted merely to be brushed aside by the Court. Justice means justice to the parties in any particular case and justice according to law.

22. The Court, on the facts and circumstances of a particular case, in the larger interests of administration of justice may excuse or overlook a mere irregularity or a trivial breach in the observance of any procedural law for doing real and substantial justice to the parties. But, sometimes, it may lead to miscarriage of justice so, balance has to be struck.

23. In the present case, the appellant knew about the death of Bholanath before filing the appeal and impleaded respondents Nos. 1 to 3 as legal representatives of Bholanath. Shambhunath (respondent No. 1) took an objection on 10-5-72 and it was the time the appellant came to know that there were other legal representatives of Bholanath who ought to have been impleaded as respondents in the appeal. But, they did not take any steps till 3-9-73 when for the first time, he moved an application for impleading them as party to the appeal. The appellant did not file any application u/s 5 of the Limitation Act for getting the delay condoned in making this so belated application; and no sufficient cause worth the name has been shown which prevented him from making application, earlier or soon after he came to know that some other legal representatives of Bholanath had not been impleaded as respondents and no reason has been shown as to why application was made so late. Since it has not been disputed that the decree is indivisible and that the legal representatives who have not been impleaded are necessary parties, the decree passed by the trial court will remain intact vis-a-vis these legal representatives which will amount to two contradictory decrees and the appeal as had been framed, before the first appellate Court was not competent and could not have proceeded in the absence of the remaining heirs. The appellant has not moved any application either u/s 153, C.P.C. or under Order 1. Rule 10, C.P.C. He has remained satisfied only by

moving application under Order 41. Rule 20. C.P.C. read with Order 22, Rules 3 and 4 and Section 151, C.P.C. Hence. I do not find any force in this appeal.

24. Before parting with his judgment. I think it proper to mention about several applications pending in this case. The respondent No. 1 (Shambhunath) died on 27-9-78 and the application to bring his legal representatives under Order 22. Rule 4 was filed on 2-7-85. The appellant has also filed application under Order 22. Rule 9, C.P.C. as also another application u/s 5 of the Limitation Act to which reply has been filed on behalf of Kailash, proposed legal representatives of Shambhunath and who has opposed these applications. He has submitted affidavit of Kailash and Shyamnath Bhargava in respect of his reply to which a counter-affidavit has also been filed by the appellant.

25. In view of my conclusions already drawn that the appeal has got no force, it is not necessary for me to give findings on these applications. The learned counsel for the appellant has not pressed his application under Order 22, Rule 4, C.P.C., filed on 10-2-86 for bringing legal representatives of Smt. Jherani on record. As such, it is rejected.

26. At the conclusion of judgment, the learned counsel for the appellant submitted that some time may be granted to his clients so that they may file an appeal against this judgment and obtain a stay order from the Supreme Court. This prayer is opposed by the learned counsel for the respondent who, submitted that the appellant has misused the stay order and an application for contempt has already been filed on behalf of his clients.

27. In the result, this appeal fails and is hereby dismissed without any order as to costs. However, in the interest of justice, I think it proper to grant two months time to the appellants and stay execution of the decree provided they file an undertaking within one month before the Deputy Registrar of this Court to the effect that they will comply with the decree in case they are unable to obtain any stay order from Hon"ble the Supreme Court.