

(1989) 09 MP CK 0002

In the Madhya Pradesh High Court

Case No : Miscellaneous Appeal No. 68 of 1978 (G)

Smt. Chameli Devi and others

APPELLANT

Vs

Puttu Singh and others

RESPONDENT

Date of Decision : 19-09-1989

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 3

Citation : (1989) MPJR 897

Hon'ble Judges : R.C. Lahoti, J

Bench : Single Bench

Advocate : S.L. Jain, for the Appellant; Indapurker, Advocate, for the Respondent

Judgement

R.C. Lahoti, J.

Law if silent, a judge ought not to lament the draftmen for having not provided for this or that or for having been guilty of some or other ambiguity. He should not fold his hands and sit silent. "A judge should ask himself the question. If the makers of the Act had themselves come across this ruck in the texture of it, how would they have straightened it out ? He must then do as they would have done. A judge must not alter the material of which it is woven, but he can and should iron out the creases." This echo of observations made by Lord Denning in *Seaford Court Estate Ltd. v. Asher* 1949 2 K.B. 481 must provide key to solution to a short subtle but substantial riddle raised in the case, no precedent on the point from the Apex Court and High Court of M. P. being available as stated at the Bar.

The Defendant/Appellants are aggrieved by an order of the District Court whereby the judgment and decree of the Trial Court dismissing as barred by res judicate a suit for declaration of title and recovery of possession filed by the Plaintiff/Respondent, have been set aside and the case remanded for disposal afresh on merits.

1. Facts relevant and necessary for the purpose of decision in this appeal are not

in controversy.

2. Late Bahgwan Kunwari, widow of Jaharsingh, filed a civil suit registered as C. O. S. No. 171/63 in the Court of Civil Judge Class II, Bhind praying for a decree declaring her title to the suit land as also for recovery of possession from the Defendant Devi Singh. On 11-8-67 Bhagwan Kunwari expired. Jodha Singh, (predecessor-in-title of the present Plaintiff/ Respondents), moved an application under Order 22, Rule 3 Code of CPC seeking leave to be brought on record as legal representative of the deceased. This Jodhasingh was the real brother of late Jaharsingh, (husband of Bhagwan Kunwari). The application was contested by Devisingh, the original Appellant, who having died his L. Rs. have been brought on record before this Court), submitting that it was one Yadunath Singh who was adopted as a son by late Jaharsingh and who alone would be the legal representative of Bhagwan Kunwari. In view of there being a registered deed of adoption in favour of Yadunath Singh, on 28-3-1969, the Civil Judge held that Jodha Singh could not be brought on record as a legal representative of the deceased Plaintiff. The suit was held to have abated for want of any legal representative having been brought on record A revision preferred by Jodhasingh met with a rejection by the High Court.

3. Thereafter, Jodhasingh filed the present suit seeking two declarations: that he be declared to be the legal representative and successor of late Bhagwan Kunwari, and that he be also declared to be the owner of the property left by late Bhagwan Kunwari. In addition, recovery of possession was also prayed.

4. Here itself two other relevant facts may also be noticed: Yadunath Singh, the person stated by Devisingh the Defendant, to be the adopted son of late Jaharsingh (and Bhagwan Kunwari) had never applied to be brought on record in the earlier suit; and the suit properties in this case consists of certain other properties also over and above the land which was in dispute in the earlier suit.

The Defendant contested the suit on the ground inter alia that in view of decision in C.O.S. No. 171/63, the present suit was barred by res judicata. The trial Court framed a preliminary issue on the point and upheld the objection resulting into dismissal of the suit.

In appeal preferred by the Plaintiff, the learned District judge took a contrary view holding that the suit was not barred by res judicata. The Defendant has come up to this Court.

The question which arises for consideration is whether the present suit could be dismissed at the threshold as barred by res judicata without a trial on merits.

The suit is not barred by res judicata is an inference that can be drawn unhesitatingly. Unless and until a plea has been heard and decided by the Court, a dismissal would not operate as res judicata against the Plaintiff in a subsequent suit on the same cause of action. See, Shivashankar Prasad Shah and Others Vs. Baikunth Nath Singh and Others, . The earlier suit was dismissed as abated but

not as having been heard and determined.

The shoe would, in fact, pinch elsewhere. The real question to be examined would be whether the bar created by Sub-rule (1) of Rule 9 of Order 22 C.P. C. would mar the maintainability of the suit. Though such a plea has been taken in the written statement in so many words, but it does arise from the facts admitted between the parties and hence, it would not be proper to shut out the plea without being examined. The dismissal of a suit on the ground of abatement cannot operate as *res judicata* though a second suit on the same cause of action will, of course, be barred. The reason being that *res judicata* ordinarily arises out of a decision given on merits while a bar against a fresh suit based on same cause of action is founded on the provisions of law as laid down in the Code of Civil Procedure. See *Sheikh Habibulla Vs. Jamuna Singh and Others*, .

A bar similar to one created by Order 22, Rule 9(1) is to be found in Order 23, Rule (4) and Order 9 Rule 9(1) C.P. C. In all such cases, the Plaintiff is debarred from instituting any fresh suit on the same cause of action. In *Gajpat Singh Vs. Sudhan*, ., it was held:

The abatement of a suit does not deprive the unsuccessful Plaintiff of his bundle of rights. It merely debars him from suing again on the same cause of action just as the law of estoppel leaves the rights untouched but bars the remedies. The bar against a fresh suit is created by Order 22, Rule 9(1) itself and not because the order of abatement operates as a judgment.?

The reason is apparent. If a decision under Order 22 Rule 1(4), Order 9 Rule 9(1) and Order 22, Rule 9(1) Code of CPC were to constitute *res judicata*, there would have been no necessity of enacting in specific terms the exclusion of right bringing a fresh suit in all the above-referred to provisions. To put it in other words, a dismissal of suit under any of the abovesaid provisions does not extinguish the title of the Plaintiff or of the legal representative, nor does it operate as *res judicata* and such a person would be entitled to set up the same defence as a Defendant in the event of an occasion arising for the purpose, as put by the Full Bench in *Gajpat Singh (supra)*.

A Division Bench of Allahabad High Court in *Kamal Ahmad v. Dr. Director of Consolidation* 1972 ALJ 772 said:

We are not inclined to read Rule 9 as having the effect of extinguishing the cause of action. Section 28 of the Limitation Act, 1908, specifically provides for the extinguishment of the cause of action, when a suit for possession becomes barred by time. There is no similar provision in Rule 9. In our opinion, the abatement did not destroy the cause of action and it could be availed of, if the law provided some remedy then a suit to the Respondents to ventilate their rights.

A similar view was taken by a Full Bench of Calcutta High Court in *Santosh Kumar Mondal and Others Vs. Nandalal Chakrapani and Others*, .

A person seeking to be brought on record in place of the deceased Plaintiff having failed in establishing his claim as a legal representative of the deceased and having not been brought on record of the suit to enable its further prosecution, the suit would technically abate under Order 22, Rule 9(1) C.P.C , if there was none else brought on record. Now having noticed that the abatement would not have the effect of *res judicata*, the question arises, what would be the remedy of the person, who failed in coming up on record.

It is well settled that an order passed on an enquiry contemplated by Rule 5 of Order 22 is an order based in a summary enquiry and is final only for the purpose of that suit. The determination of the question whether a person is a legal representative of the deceased is for a limited purpose of conducting the litigation. The mere fact of substitution of the applicant as a legal representative of the deceased does not make him a heir of the deceased litigant or fetter the other party to the litigation from questioning his claim in an appropriate proceeding See *Raghunath Singh v. Gangabai* 1961 MPLJ 398. The converse is also true. Merely because the claim of a person to represent the estate of the deceased litigant as the heir of the deceased has been denied would not mean that in appropriate proceedings he cannot establish his right to the heirship of the deceased. To sum up, the person against whom went the result of the enquiry would not be debarred from instituting a suit to establish his title as a legal representative of the deceased.

Yet another question arises; whether such a person would be free also to reagitate and call for adjudication on the same cause of action in respect of same property, as were involved in the earlier suit ? Or otherwise, having instituted the suit to establish title as a legal representative and having succeeded therein what will be the course left open to him ? The learned Counsel for the Respondents has argued that the law permits a suit to establish title as a legal representative and inasmuch as consequent to that determination only he will be entitled to have the same cause of action adjudicated upon, there should be no difficulty in permitting him to canvass the same cause of action again in the subsequent suit. Such an argument cannot be accepted because in spite of the determination of a suit by abatement, not constituting *res judicata*, the bar enacted by Sub-rule (1) of Rule 9 of Order 22 would come into play and the second suit would not be maintainable to that extent.

1. *Mst. Laxmi v. Ganpat* AIR 1921 Nag. 23 was a case wheee one Mst. Paru brought a suit against her deceased brother's widow Mst. Laxmi for possession of certain property alleged to be the ancestral property of her father. The suit was dismissed partly. Paru appealed, but died during pendency of the appeal. Application filed by one Ganpat, styling himself to be the husband of Mst. Paru and seeking to be brought on record in her place was rejected by the appellate Court upholding the objection that the marriage was not in an approved form and hence Ganpat was not entitled to succeed to Mst. Paru. Then Ganpat brought a suit for declaration that his marriage with Paru was in an approved form and

that he was her legal representative and also for possession of the property, the claim to which was disallowed by the trial Court earlier and the appeal had abated. In the new suit, relief of declaration was granted but the claim for possession was refused as barred by *lis pendens*. The judge deciding the latter suit opined that the Plaintiff must apply to revive the original appeal or rather must be brought on record on the ground that the appeal had never abated. It was held that the appeal could have abated only where no application was made within time limited by law, but in the case at hand, the suit would not be held to have abated, as an application was made by Ganpat within time. Noticing the history of the provision, it was held that Section 367 of the Code of 1882 gave the Court before which the question as to who the legal representative of a deceased Plaintiff was arose, the option of deciding the question itself or staying the suit until the question had been decided in another suit. The object of Rule 5 of Order 22 seems to be merely to take away the option and compel the Court to decide the question itself. The rule does not lay down that the Court has exclusive jurisdiction to determine it and that no other Court can try and decide the question when brought before it in a regular suit so as to affect its decision.

2. Ganpat then applied to the District Judge to proceed with the appeal (which was treated abated). The application was allowed and then the appeal too was allowed decreasing such claim on merits as was disallowed by the trial Court. The decree and the procedure so adopted were upheld.

3. The view taken by Kotwal, A.J.C. in *Mst. Laxmi v. Ganpat* (supra) was followed by Pollock J in AIR 1940 99 (Nagpur) .

The meaning of the word "abatement" was explained in *Ganpat Singh* (supra) by borrowing it from *Kelly v. Rochelle* 93 SW R. 164 in the following words:

An abatement, in the sense of the common law, is an entire overthrow or destruction of the suit, so that it is quashed or ended. But, in the sense of a Court of equity, an abatement signifies only a present suspension or all proceedings in the suit, for the want of proper parties capable of proceeding therein. At common law a suit, when abated, is absolutely dead. But a suit in equity, when abated, is (if such an expression be allowed) merely in a state of suspended animation, and it may be revived.

The Full Bench said:

Furthermore, when it is said that a suit has abated, it means that the suit was never there or was in a state of animated suspension. Only an order of revival could bring life into it.

I find myself in respectful agreement with the view taken in *Mst. Laxmi* (supra) and *Ganpat Singh* (supra).

To sum up, the legal position arising from an order passed under Order 22 Rule, 5 Code of CPC read with Rule 9(1) Code of CPC holding the suit to have abated consequent to refusal to status of the applicant as legal representative of the

deceased Plaintiff, based upon a summary enquiry, the following consequences and course of action would follow:

- (i) The determination that the applicant was not the legal representative of the deceased Plaintiff would be final and conclusive in so far as that suit is concerned;
- (ii) That order would not debar the applicant from filing a regular suit to establish his own title as a legal representative of the deceased Plaintiff;
- (iii) On such status having been determined and declared in such a title suit, the applicant would be at liberty to invite the attention of the Court, before which earlier suit had abated to revive the hearing, treating the suit to have been in a state of suspended animation;
- (iv) A fresh suit on the same cause of action relating to the same property would be barred not by *res judicata* but because of the rule enacted in Sub-rule (1) of Rule 9 of Order 22 C.P.C.

The result of the abovesaid discussion is that both the Courts below were not right in concentrating on the issue as to whether the order abating the earlier suit constituted *res judicata* or not for the present suit. The decision should have been:

- (i) Rejection of application by Jodha Singh seeking to be brought on record as a legal representative of Smt. Bhagwan Kunwari in C O. S. No. 171/63 and consequent dismissal of the suit as abated does not constitute *res judicata* for a suit seeking declaration as to entitlement of Jodha Singh to entitle as a legal representative of Mst. Bhagwan Kunwari;
- (ii) The dismissal of the earlier suit as abated does not constitute *res judicata* nor does it bar the institution of the present suit in so far as such property is concerned, as was not the subject-matter of earlier suit instituted by Mst. Bhagwan Kunwari; to that extent suit shall proceed and be heard and determined on merits; all defences other than of *res judicata* being also open;
- (iii) On late Jodha Singh being declared to be the legal representative of deceased Mst. Bhagwan Kunwari, the Appellants being the legal representatives of late Jodha Singh would be entitled to invite the attention of the Court which had held C.O.S. No. 171/63 to have abated, to this decision with a prayer to revive that suit from a state of animated animation.

The impugned order of the lower appellate Court and the judgment and decree of the trial Court, are all set aside. The suit is remanded to the trial Court for disposal in accordance with law, consistently with the principles laid down hereinabove. The parties are left to bear their own costs before this Court and the lower appellate Court.

The parties are directed through their respective counsel to appear before the trial Court on 6-11-1989 before which date the office shall see that the records reach back there along with a copy of this order.