

(1980) 09 SHI CK 0009

In the High Court Of Himachal Pradesh

Case No : C.M.P. No. 1012 of 1980 in Regular Second Appeal No. 160 of 1968

Smt. Dwarkoo and Another

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 29-09-1980

Acts Referred:

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

Citation : AIR 1981 HP 29 : (1981) ShimLC 49

Hon'ble Judges : V.D. Misra, C.J;H.S. Thakur, J

Bench : Division Bench

Advocate : Chhabil Dass, for the Appellant; Inder Singh, for the Respondent

Final Decision : Allowed

Judgement

H.S. Thakur, J.—The appellants/ petitioners have filed this application _ praying that the appeal be proceeded with and disposed of, without bringing on record unknown legal representatives of the deceased Bardoo (previously respondent No. 9).

2. The facts relevant to dispose of this petition may be briefly stated. Bardoo deceased was one of the respondents in this appeal. He is stated to have died on 9th March, 1979. After the appellants came to know about the death of Bardoo they filed an application (C.M.P. No. 728 of 1"979) for bringing his legal representatives on record. Since there was a short delay in filing the application, an application No. C.M.P. 729/1979 was also filed by the appellants to condone the delay. Both the applications were allowed by this Court. By an order dated 21st of August, 1979 Shri Sukh Dev alias Dev, was ordered to be brought on record, as the legal representative of the deceased. On 28th of May, 1980 Shri Arun Goel Advocate, appeared on behalf of Sukh Dev alias Dev, and made a statement that the deceased had disposed of his property by way of will in favour of some other person, and Sukh Dev has no interest in it. He further stated that the person upon whom the property has devolved be brought on record and that Sukh Dev was not interested in defending the appeal On 17th June, 1980, when

the appeal came up for hearing, a preliminary objection was raised by Shri Inder Singh, learned counsel for" the respondents, that a proper person has not been brought on record as legal representative of the deceased respondent. The learned counsel also contended that no steps were taken by the appellants to find out about the will, if any, and as to who was the legal representative of the deceased-respondent.

3. Arguments were heard about the present legal representative not being the proper person, and the record being defective. On that account the question arose whether the appeal as a whole was to abate or had become incompetent? The arguments on appeal were also started by the learned counsel for the appellants. We, however, noticed that in case the preliminary objection was to prevail there was no use of hearing the parties on merits. The learned counsel for the appellants also asked for adjournment.

4. The appellants filed the present application, and on 4th July, 1980, Shri Inder Singh, the learned counsel for the respondents, took time to file reply to the same. The reply was accordingly filed.

5. In the application, it is stated on behalf of the appellants, that no doubt Bardoo died on 9th March, 1979, but no mutation of inheritance has been recorded nor any report has been made by anybody before the revenue authorities, relating to the death of Shri Bardoo and claiming the property as his heir, either by succession or by a will, as required u/s 35 of the Himachal Pradesh Land Revenue Act. It was also stated that no probate or letters of administration to the will have been obtained or applied for by any person in any Court at Bilaspur. It was also contended that the appellant No. 2 had made full enquiries about the inheritance and it was found that Sukh Dev was the nearest heir of the deceased who was entitled to succeed to his estate and has even taken possession of the movable properties of Bardoo deceased. It was also asserted that by an order dated 21st of August, 1979 this Court has already brought, Shri Sukh Dev on record as the legal representative of the said deceased. It was also contended that the statement of Shri Arun Goel was vague regarding the making of a will by Bardoo, inasmuch as it was not indicated by him, as to in whose favour the will had been executed. As such, according to the appellants, Shri Sukh Dev is the only legal representative of the deceased. In the reply filed on behalf of respondents 3 to 6 and 8, it has been contended that the appellants have not brought the legal representatives of deceased Bardoo on record and on that account the appeal had abated. It was also denied that Shri Sukh Dev had taken possession of movable and immovable properties of the deceased respondent. The plea of will, having been executed by Bardoo deceased had been reiterated. Ultimately it was prayed on behalf of the said respondents that the appeal be dismissed, as having been abated.

6. It may be relevant to refer to some of the documents which have been filed on behalf of the appellants, with this application. There is a report made by the Patwari of the area concerned, attesting that Bardoo had died but no mutation of

inheritance had been entered. This report is dated 24th of June, 1980. There is another report, dated 23rd of June, 1980, that no report regarding the death of Bardoo had been made and that the same shall be entered after enquiry from the successors, if any, of the deceased. It is also indicated that till that date the property stands in the name of the deceased. Attested copy of a will has been also filed but it is not clear as to when and by whom this copy has been obtained.

7. The question which falls for determination in this application is whether the appeal has abated or not? As discussed earlier above, the appellants took all possible steps to bring the legal representative of the deceased respondent on record. So much so that this Court by an order dated 21st of August, 1979 while deciding C.M.P. 728/79 ordered that Sukh Dev be brought on record as a legal representative of the deceased. Shri Sukh Dev did not put his appearance earlier but it was on 28th of May, 1980, that Shri Arun Goel appeared on his behalf and stated that the deceased had disposed of his property by way of a will in favour of some other person and that Sukh Dev had no interest in it. It was not indicated in the statement as to when the will was executed and who were the persons in whose favour the same was executed. Assuming that Shri Sukh Dev who is brought on record as the legal representative of the deceased Bardoo, is not the real legal representative, and the decree is passed against him what would be its effect on the decree. In *Jagannath v. Tinhananda Das* MR 1952 Ori 312 a Division Bench of that Court observed as

"The principle is that a person who is impleaded as the legal representative of another, which he is not, in execution of decree, sufficiently represents the estate with the result that an order passed against him is held to be binding upon the true representative though the latter was not a party to the same -- See "*Mal-karjan v. Narhari*" 19001 27 T App 216 So long as the decree-holder acts bona fide and takes care to ascertain that the person he proposes to implead is the de facto representative of the deceased judgment-debtor, the fact that that person subsequently turns out to be the wrong party will not affect the validity of the proceedings.

If, in ignorance of the legal heir the decree-holder impleads a wrong person and the person having the real title does not intervene, the proceedings will be binding on the latter in the absence of any fraud or collusion. In a case where there are rival claimants to the estate of a deceased person, it is open to the decree-holder to choose the person, who appears to have a prima facie title. The authorities on the subject are fully discussed in "*Sanna Govappa v. Rodda Sanna Govappa*", -MR 1929 Mad 482."

8. Similarly in *Bibhuti Bhusan Roy and Another Vs. Narendra Narayan Ghose and Others*, a Division Bench held as under:

"The Courts below have negatived that point made by the plaintiffs in the present suits by relying upon two decisions of the Madras High Court. The first decision relied upon is *Sanna Govappa Vs. Rodda Sanna Govappa and Others*, and the

second decision relied upon by the Courts below is the decision of the same High Court in Chaturbujadoss Kushaldoss and Sons Vs. Rajamanicka Mudali by father and next friend Ekambara Mudaliar and Another, In both these decisions all the earlier authorities on the subject have been pare-fully reviewed, and it has been held that if a plaintiff in good faith sues a person who appears to him to be the proper legal representative of the deceased debtor, and there is no fraud or collusion in the proceedings, then a decree so obtained is binding on the deceased's estate whoever may be the actual legal representative; the essential question to be considered in such cases is whether the estate of the deceased person was suffi--ciently represented by the legal representative who had been brought on the record."

9. We have, alfo noticed some decisions in which a contrary ivow, to the above view, has been taken. But in the i"aee of the amendments made in the Code of Civil Procedure, the provisions in the case of dormant respondents have been liberalized, inasmuch as a new Rule 4-A has been introduced under Order XXII of the Code of Civil Procedure. It may be convenient to reproduce the said Rule:

"4A. Procedure where there is no legal representative. (1) If, in any suit, it shall appear to the Court thai any party who has died during the pendency of the suit has no legal representative, the Court may, on the application of any party to the suit, proceed in the absence of a person representing the estate of the deceased person, or may by order appoint the Administrator-General, or an officer of the Court or such other person as it thinks fit to represent the estate of the deceased person for the purpose of the suit; and any judgment or order subse-quently given or made in the suit shall bind the estate of the deceased person to the same extent as he would have been bound if a personal representative of the deceased person had been a party to the suit.

(2) Before making an order under this rule the Court:--

(a) may require notice of the application for the order to be given to surh of any) of the persons having an interest in the estate of the deceased person as it thinks fit; and

(b) shall ascertain that the person pro-posed to be appointed to represent the estate of the deceased person is willing to be so appointed and has no interest adverse to that of the deceased person."

10. There is no dispute that Bardoo died after coming into force of the latest amendments in the Code of Civil Procedure. Even the order making Sukh Dev as the legal representative of the deceased was passed after these amendments. It is the case of Sim Sukh Dev that he has no interest in the estate of the deceased. It is, however, not pointed out by him as to who are the real legal representa-tives of the deceased. The will, a copy whereof, as referred to above, has been produced, apparently appears to have been executed during the month of December, 1965, and registered on 4th of January, 1966. The claimants on the basis of the said will have not taken any step, as contended in the application, to

obtain any probate or letters of administration of the will. Even a mutation on that basis has not been entered. As such, it cannot be reasonably presumed that they may be interested in the estate of the deceased. Accordingly, it can be inferred that there is no other real legal representative of the deceased. Consequently We are of the view that the provisions of the aforesaid Rule 4-A of Order XXII can be applied to the facts of the case,

11. Under the circumstances it is evident that the deceased Bardoo, has no real legal representative and the appeal can proceed, in the absence of the person representing the estate. It is further held that the appeal has not abated. We are also of the view that no notice is required to be given to any person under sub-rule (2) (a) of Rule 4-A of Order XXII of the Code of Civil Procedure, as no reasonable basis exists for the same.

12. For the foregoing reasons, the application filed by the appellants/petitioners is allowed, but with no orders as to costs.