
(1959) 03 MP CK 0019

In the Madhya Pradesh High Court

Case No : Letters Patent Appeal No. 201 of 1956

Swamiprasad

APPELLANT

Vs

Bada Rai Sawai Singhai Churaman and Others

RESPONDENT

Date of Decision : 25-03-1959

Acts Referred:

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

Citation : AIR 1960 MP 14 : (1959) ILR (MP) 244 : (1959) 4 MPLJ 1090

Hon'ble Judges : T.C. Shrivastava, J;P.R. Sharma, J

Bench : Division Bench

Advocate : J.P. Dwivedi, for the Appellant; S.R. Nanhoriya, for the Respondent

Final Decision : Dismissed

Judgement

Sharma, J.

This is a Letters Patent Appeal against the judgment dated 28-9-1956 delivered by Mudholkar J. in Miscellaneous Appeal No. 193 of 1953 arising out of the order dated 31-8-1953 passed by the Second Civil Judge Class I Jabalpur in civil suit No. 13-A of 1952.

The material facts for the purposes of the present appeal are as follows: A suit was filed against ten persons for possession of a portion of a house belonging to the plaintiffs. According to the latter the defendants taking advantage of their absence had disturbed their possession and wrongfully entered into possession of a portion of the house in dispute in the year 1946. The defendants denied the plaintiffs claim.

During the pendency of the suit, defendant No. 2 Ganeshprasad died on 5-11-52 and the defendant No. 3 Badriprasad died on 4-11-52. The plaintiffs' applications for bringing the legal representatives of these persons on record as also for Setting aside the abatement and for condonation of the delay in making the said applications, were rejected. The trial court held that the suit cannot be proceeded with in the absence of the legal representatives of the deceased

defendants and, therefore, ordered the suit to be dismissed as a whole.

On appeal before a Single Judge of this Court it was held that the entire suit could not be dismissed by reason of its abatement as against defendants Nos. 2 and 3. The trial Court, therefore, was directed to proceed against the remaining defendants and dispose of the suit in accordance with law. The present appeal is filed against this order passed by the appellate Court.

The question as to whether in the absence of the legal representatives of the deceased defendants the entire suit must fail depends on the nature of the suit, the relief sought and whether an effective decree can be passed by the court against the remaining defendants in the absence of the legal representatives of the deceased defendants.

It has been uniformly held that in the cases of redemption or foreclosure of a mortgage or of preemption or partnership the failure to bring on record the heirs of a deceased plaintiff would result in the entire suit being rendered incompetent. The present suit, however, is one for possession of a portion of a house, a permanent injunction restraining the defendants from interfering with the possession of the plaintiffs, a decree for Rs. 480/- as mesne profits for a period of 3 years prior to the date of the suit and for future mesne profits at the rate of Rs. 40/- per month jointly and severally against the defendants till the possession is delivered to the plaintiffs.

The plaint nowhere alleges that the defendants are joint tort-feasors or that they are in possession of any specified shares of the property in dispute. The question that has to be decided, therefore, is whether in the absence of the heirs of the deceased defendant, Ganeshprasad and Badriprasad an effective decree can be passed against the remaining defendants. There is nothing on the record of the case to show that the heirs of the deceased defendants are still in possession of any portion of the property in dispute and if so whether it is possible to separate the portion of the house in their possession from that under the occupation of the remaining defendants. It has been observed in para 280 in Vol. 32 of the Hailsham's Edition of Halsbury's Laws of England as follows:

"to constitute a joint tort there must be one *damnum* and one *injuria*. ----- one test which is not exhaustive, is, Is the cause of action against the tortfeasors the same?"

It has been held in *Cocke v. Jennor*, 1 Marsh 603 that a covenant or agreement not to sue one of the joint wrong-doers is no defence to an action against others; while it was held in *Duck v. Mayeu* (1892) 2 QB 511, that if while releasing one of the tortfeasors rights against another are reserved, it will be construed as a covenant not to sue and not a release. The same view has been expressed in para 405 at page 259 of Clerk and Lindsell on Torts.

In this case even in the absence of the heirs of the deceased defendants, the plaintiffs are entitled to an injunction against the defendants who are yet on

record restraining them from interfering with the plaintiffs' possession. In so far as the question regarding relief as to possession is concerned, I have already noted above that there is no material on record to show if any of the legal representatives of the deceased defendants are in possession of any portion of the property in dispute.

In fact it was pointed out to it by the learned counsel for the respondents that he has amended his plaint so as to strike out the names of Badriprasad and Ganeshprasad who died in the course of the suit, as well as another defendant Gourishankar who died during the pendency of the appeal, along with five other defendants, from the plaint. This amendment which was effected with the leave of the Court alters the entire complexion of the case. In the case of Shibban and Others Vs. Allah Mehar and Another it was observed by Sulaiman C. J. as follows:

"But where a suit is brought for possession of immovable property against certain trespassers and an injunction also is claimed against them, it cannot be said that a decree for possession and injunction against some of the trespassers is so contradictory to a dismissal of the suit as against some others that it cannot be passed. It may well be that a plaintiff is prevented from objecting to the entry of a particular defendant with whom he may afterwards amicably settle the matter but that is no ground to refuse him similar relief as against other persons to whom also he objected. Had a suit been brought against these trespassers only without impleading some of the other trespassers it could not have been dismissed on the simple ground that the other trespassers who were also either in possession or interfered with the plaintiff's possession had not been impleaded".

The same principle would apply to a case where a defendant respondent dies during the pendency of an appeal filed against the dismissal of such a suit by the trial Court.

I respectfully agree with the view of the Madras High Court expressed in *Kosaraju Peda Subbayya and Others Vs. Moravaneni Veerayya and Others*, that the mere coincidence of a number of persons doing a series of acts will not amount to their acting in combination and that the omission to implead some of the wrong-doers will not be fatal to the suit. The same view has been taken in *Radamal v. Nighahia* AIR 1934 Lah 941, in which it was held that even if some of the legal representatives of the deceased defendants are in possession of the property in dispute the plaintiffs can seek eviction of the defendants who are still on record and an injunction restraining them from interfering with the plaintiff's possession thereof.

The plaintiffs would in that case be entitled only to joint possession of the property in dispute with such other persons as are in possession and are not bound by the decree passed in the suit. I find that the decisions of the Calcutta High Court relied on by the learned counsel for the appellants are distinguishable from the present case. In the case of *Hakir Mahamed and Others Vs. Abdul Majid*

and Others, there was a categorical statement in the plaint that the defendants by a concerted act threw earth on a portion of the pathway and were preparing to put up a mud wall on that portion.

In the present case there is no allegation that the defendants by a concerted act wrongfully entered into possession of the property. Another case relied by the learned counsel for the appellant is the one reported in Arunadoya Chakrabarty and Others Vs. Mahammad Ali and Others, . This case no doubt lays down that in a suit for possession all persons in possession should be joined as defendants and that no effective decree can be passed in the absence of the heirs of the deceased defendants. But in the concluding portion of their judgment their Lordships have observed that there had been no investigation in the case as to whether the legal representative of the deceased defendant was in possession and if so whether her possession was over a specific portion of the land in suit

Their Lordships gave the plaintiffs an opportunity of establishing that the legal representative of the deceased defendant might well be left out on an investigation held on the lines indicated in the case of Srimoti Sarat Kamini Dasi and on her Death her Heirs and legal Representatives Her Sons Jamini Mohan Sarkar and Others Vs. Chaitanya Chandra Prohoraj alias Chaitanya Charan (Chandra in Vokatnama) Mohapatra and Others, . This case, therefore, is no authority for the broad proposition canvassed by the learned counsel for the appellant before us. The only other case cited on behalf of the appellants that deserves notice is Sheoram and Another Vs. Prem Shankar and Others, . In this case a suit for joint possession of certain plots of lands instituted by a number of persons against one Darshan was decreed by the trial Court, Darshan then went up in appeal to the District Judge but the appeal was dismissed and the decree passed by the trial Court was upheld. He then went up in second appeal. During the pendency of this appeal one of the four respondents died and an application for setting aside the abatement of the appeal as against him was rejected.

The High Court of Allahabad held that the appeal abated as a whole. This case can have no application to the present case. Here no decree was passed against the defendants but the suit was dismissed against them all. The death of one of the defendant respondents during the pendency of the appeal could not as already stated above result in the abatement of the appeal as a whole.

In result this appeal is dismissed with costs. Hearing fee Rs. 50/-.