

(1977) 01 RAJ CK 0023
In the Rajasthan High Court
Case No : Civil Writ Petition No. 743 of 1973

Teju and Others

APPELLANT

Vs

Board of Revenue and Others

RESPONDENT

Date of Decision : 04-01-1977

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 11, Order 22 Rule 4
Constitution of India, 1950 — Article 226

Citation : AIR 1978 Raj 16

Hon'ble Judges : R. Sachar, J; M.L. Jain, J

Bench : Division Bench

Advocate : K.C. Samdaria, for the Appellant; N.P. Gupta, for the Respondent

Final Decision : Dismissed

Judgement

Sachar, J.—This writ petition challenges the impugned order of the Board of Revenue dated September 26, 1972 by which it held that the appeal of the petitioners has abated in entirety.

2. Plaintiff respondent filed a suit against the present petitioners and some other defendants on the allegation that the petitioners had forcibly occupied the land which the plaintiffs claim in their ownership. The disputed land was comprised in three Khatas, namely, Khata No. 116/1, Khata No. 117 and Khata No. 122-1. The defendants in their reply denied that they had forcibly occupied the land. On the contrary, they pleaded that they were in occupation of the separate pieces of land for a number of years. In the written statement, the possession of different defendants to different numbers was separately mentioned as being in their possession since long. The trial Court by its judgment dated April 20, 1956, dismissed the suit. The appellate Court accepted the appeal and remanded the case. However, the second appeal before the Board of Revenue was accepted which set aside the order of the Revenue Appellate Authority and directed it to record evidence and give a fresh decision. In pursuance of this, the Revenue Appellate Authority decided the matter afresh and gave a judgment dated

September 17, 1964. By this judgment, it was held that the plaintiffs had proved their title in the suit land mentioned in Khata No. 117. Regarding Khata No. 116/1, it found that plaintiffs have failed to prove their case excepting Survey No. 2589. Regarding Khata No. 122/1, it found that the defendants have proved their possession of Survey No. 2705 and held the possession of defendants as trespasser in the rest of the land. It consequently passed a decree in favour of the plaintiffs directing that plaintiffs be put in possession of all Survey Numbers coming under Khata No. 117 and a Survey No. 2539 in Khata No. 116/1, and of all Survey Numbers excepting Survey No. 2705 in Khata No 122/1. It also decreed that the plaintiffs be awarded compensation to the extent of three times the annual rent of the suit land which are ordered to be put in their possession from the date of the dispossession to the date of restoration.

3. All the defendants filed an appeal before the Board of Revenue. During the pendency of the appeal, three of the defendant-appellants, namely, Kachra son of Amarji, Dala son of Amarji and Bhimji s/o Lalji died. No legal representatives of the said deceased persons were brought on record within time. The Board of Revenue by its order dated July 27, 1971 held that the appeal had abated in so far as the deceased appellants were concerned and left the matter, whether the appeal could proceed to be decided later on- Subsequently, the Division Bench of the Board of Revenue by the impugned order held that the effect of not impleading the legal representatives of the deceased appellants Kachra son of Amarji. Dala son of Amarji and Bhimji son of Lalji is that the appeal abates in its entirety. It is against this order that the present writ petition has been filed.

4. There is no dispute about the order of July 21, 1971 by which it was held that the appeal shall abate so far as the deceased appellants-defendants were concerned. The only dispute is whether because of the non-impleading of the legal representatives of the deceased appellants, the appeal cannot be proceeded with. The counsel for the petitioner Mr. Samdaria urges that the Board of Revenue was not right in holding that the whole appeal had abated and contends that the only result of the non-impleading of the legal representatives of the deceased is that the appeal will abate qua the deceased only and not that the appeal cannot be proceeded with. In this connection, - he refers us to Nanak v. Ahmad Ali (AIR 1946 Lah 399). In that case, the plaintiff brought a suit for cancellation of the sale deed executed by Gumani defendant No. 1 in favour of Nanak and Khair-ud-din defendants Nos. 2 and 3. The suit was dismissed by the court of first instance. In appeal, the senior Sub-Judge allowed the plaintiff's appeal and decreed his claim. Against that decree, Nanak and Khair-ud-din filed an appeal in the High Court. During the pendency of the appeal, Nanak had died and the objection was that in the absence of an application for bringing his legal representatives on record, the appeal had abated. The Full Bench, however, held that in such a case, the appeal does not abate in toto but only with regard to the deceased appellant. The Full Bench, however, held,--

"Where a person claiming to be the true owner of certain property obtains a

decree for possession of that property against trespassers, each trespasser has an independent right to appeal against the decree and the mere circumstance that one of the defendants does not appeal from the decree or even confesses judgment would not disentitle the other to appeal. In effect and in substance in a case of this type there are as many decrees for ejectment or dispossession as there are trespassers."

The Full Bench also observed that,--

"The plaintiff could have initially instituted two separate suits for declaration against Nanak and Khair-ud-Din. Either of the two suits would not have been liable to dismissal as incompetent by reason of the necessary parties not being before the Court. The mere circumstance that he could and did join the two defendants in the same suit and asked for a declaration of his title against both does not alter the nature of his claim which in effect and in substance was one for establishment of his title against each of the two defendants. Inasmuch as the suit could, in the first instance, have been brought against Khair-ud-Din without impleading Nanak. in which case he could have been entitled to appeal from the decree, without taking any notice of what happened to the suit against Nanak, I see no legal bar to the competency of an appeal by him alone, merely because the plaintiff chose to bring one suit against two persons denying his title to the suit property."

This view was followed in *Harichand v. Mst. Bachan Kaur* (AIR 1971 P&H 355).

5. These authorities, no doubt, support the case of the petitioner though there is the obvious distinction that in the Full Bench case, the suit was for a cancellation of a sale deed and was at the most taken to be a suit for a declaration while in the present case before us, the suit was for possession. But there is no denying that the observations of the Full Bench do support the case of the petitioner. Being Full Bench of very eminent Judges, normally we would have been inclined to follow the said authority but we find that their Lordships of the Supreme Court have in cases of abatement laid down principles which with respect, we find, do not support the reasoning of the Full Bench mentioned above. In *State of Punjab v. Nathu Ram* (AIR 1962 SC 80), their Lordships of the Supreme Court have laid down the tests to determine whether an appeal can be proceeded with and one of the tests laid down when the Court will not proceed with an appeal is when the success of the appeal may lead to the Court's coming to a decision which will be in conflict with the decision between the appellant and the deceased respondent and therefore which would lead to the Court's passing a decree which will be contradictory to the decree which had become final with respect to the same subject-matter between the appellant and the deceased respondent. In that case, the Union of India's appeal against the grant of compensation to two brothers by the first Court was not held competent in view of the fact that one of the brothers had died during the pendency of the appeal and his legal representatives had not been brought on record. Their Lordships observed that there was a joint claim and the award and the joint decree was on that basis and

in the absence of a joint decree-holder, the appeal could not be proceeded with against the other decree-holder. In *Sri Chand v. Jagdish Pershad Kishan Chand* (AIR 1966 SC 1427), the party applied to execute a decree against the sureties. Objections were raised by the sureties but the same were rejected by the Sub-Judge, which order was confirmed on appeal by the High Court. During the pendency of the appeal before the Supreme Court, one of the sureties died. Question arose as to whether the appeal could be proceeded with in the absence of the legal representatives of the deceased surety appellant not having been brought on record. The Supreme Court held that in the appeal filed by the surviving appellant, it was held that the surety bond was not enforceable, there would unquestionably be two inconsistent decrees; one passed by the High Court holding that the surety bond was enforceable, and the other, the view of the Supreme Court that it is not enforceable, and it therefore took the view that the appeal could not be proceeded with. An argument was raised before the Supreme Court that such liability of surety is joint and several and as a creditor could seek to enforce the surety against some of the joint sureties, the death of one surety appellant should not make the appeal incompetent when the other surety appellants had also filed the appeal. This plea was negatived by their Lordships of the Supreme Court by the observations,-- (at p. 1431)

"Liability of the sureties is under the law joint and several..... But the fact that the surety bond is enforceable against each surety severally, and that it is open to the creditor to release one or more of the joint sureties, does not alter the true character of an adjudication of the Court when proceedings are commenced to enforce the covenants of the bond against all the sureties. We are not concerned in this appeal with the privilege which a creditor may exercise, but with the effect of an adjudication which the Court has made in a proceeding to enforce the covenant of the Bond. The mere fact that the obligation arising under a covenant may be enforced severally against all the covenantors does not make the liability of each covenantor distinct. It is true that in enforcement of the claim of the decree-holder the properties belonging to the sureties individually may be sold separately. But that is because the properties are separately owned and not because the liability arises under distinct transactions."

It is clear from the observations that the Supreme Court did not accept the reasoning that simply because a suit could have been filed against some only of the sureties, the death of one of the surety appellants without his legal representatives having been brought on record will have no effect on the appeal. Their Lordships emphasised that what is to be seen is not whether initially it was open to proceed against some of the sureties but to see the true character of an adjudication. Applying the observations, it is clear that the reasoning of the Full Bench that because the plaintiff could have filed a suit against some of the trespassers, the effect of a decree for possession against all the defendants must be treated to be a separate decree against each of them, loses much of its weight. In the present case, it will be seen that the plaintiffs case was that the defendants had illegally occupied the land. The Court had accepted this

contention and given a joint and indivisible decree for possession against all the defendants. The decree by the Revenue Appellate Authority did not specify separate shares for which possession was to be restored to the plaintiff by each separate defendant. The decree was a joint and an indivisible one. No doubt, it is true that the defendants took a position in their written statement that they were in possession of separate pieces of land but this plea has not been accepted by the Courts below. No doubt, if an appeal had been competent and proceeded with on merits, it may have been open to the defendants to show their separate possession and the Court in that case would have to deal separately with that plea. But the difficulty in the way of the defendant petitioners is that there has been an adjudication and a decree has been passed by the Revenue Appellate Authority which has held the plaintiff to be entitled to be restored possession of the land from all the defendants jointly. The decree is thus joint and indivisible one against all the defendants and not against each one of the defendants separately. In that view, as the decree was a joint and indivisible one, the death of some of the defendant-appellants would result not only in the appeal having abated with regard to the deceased appellant but will have the inevitable consequences that the appeal by the other appellants could not be proceeded with. We find that a similar view has been taken in *Innasi Udayar v. S. Chinnasamy Raju* (deed.) and we find ourselves in agreement with that view. In that view, no objection can be found to the judgment of the Board of Revenue which has held that the appeal cannot be proceeded with in the absence of the fact that no legal representatives of the deceased appellants were brought on record.

6. There is another reason for which we think that the petition must fail. It is clear that the Board of Revenue has on a consideration of the pleadings come to the conclusion that a joint and indivisible decree has been passed against the defendants and consequently, on the death of some of the appellants, the appeal could not proceed. The contention of the petitioner that the Board of Revenue was in error in arriving at this conclusion can at the most be said to be a mere error of law and not manifest error of law on which alone can this Court interfere. An error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by a writ of certiorari according to the rule governing the powers of the superior Court to issue such a writ. (See *Satyanarayan Laxminarayan Hegde and Others Vs. Millikarjun Bhavanappa Tirumale*,

7. As a result, the writ petition fails and is dismissed. No order as to costs.