

(2018) 12 PAT CK 0042

In the Patna High Court

Case No : Miscellaneous Appeal No. 900 Of 2011

Urmial Devi W/o Late Ram Chandra Thakur And Ors

APPELLANT

Vs

Bidya Thakur S/o Late Jageshwar Thakur And Ors

RESPONDENT

Date of Decision : 17-12-2018

Acts Referred:

Civil Procedure Code, 1908 — Section 2(11), Order 1 Rule 10, Order 22 Rule 3, Order 22 Rule 9(2)

Citation : (2018) 12 PAT CK 0042

Hon'ble Judges : Prakash Chandra Jaiswal, J

Bench : Single Bench

Advocate : Abhay Shankar Singh, Jitendra Kishore Verma, Abhishek Ananad, Abrind Kumar Singh

Final Decision : Allowed

Judgement

PRAKASH CHANDRA JAISWAL, J.

1. Heard learned counsel for the appellants and learned counsel for the respondents on this miscellaneous appeal.

2. This miscellaneous appeal has been preferred against the order dated 20.08.2011 passed by learned Additional District Judge, FTC-II, Samastipur in T.A. No. 4/97 whereby the learned court below rejecting the petition dated 04.02.2011 filed by the appellant nos. 3 and 4 for substitution of the heirs of appellant nos. 1 and 2 and declaring the appeal abated due to non-substitution of the legal heirs of the deceased-respondent no. 2 within the stipulated time dismissed the appeal in toto.

3. The factual matrix of the case is that the plaintiffs, who happen to be respondent nos. 1 to 15 filed Title Suit No. 65/89 for declaration of title, possession and injunction.

4. The appellants-defendants no. 1 to 4, who happen to be full brothers and have acquired the property in question through common sale deed filed common

written statement. The aforesaid suit was decreed on 31.07.1996 and assailing the aforesaid decree, the defendant nos. 1 to 4 preferred Title Appeal No. 4/97. During pendency of the aforesaid appeal, the appellant no. 1 Mahabir Thakur passed away on 22.09.2001 while appellant no. 2 Paltan Thakur in the month of October, 1998. For substitution of the heirs of the aforesaid deceased-appellants, appellant nos. 3 and 4 filed substitution petition on 04.02.2011. Though, from perusal of record, it appears that heirs of the appellant no. 1, namely, Mahabir Thakur had already been directed to be substituted in his place by the court vide order dated 20.12.2001, but the name of the heirs of the appellant no. 1 has not been incorporated in the memo of appeal either by the appellants or by their learned counsel and again the aforesaid substitution petition was filed for substitution of heirs of both the appellant no. 1 and appellant no. 2. The appellant nos. 3 and 4 did not file either any petition for setting aside abatement under Order 22 Rule 9(2) CPC or any petition for condoning the delay in filing the aforesaid substitution petition and learned court below dismissed the aforesaid substitution petition finding it a petition under Order 1 Rule 10 CPC and not under Order 22 Rule 3 CPC as the provision of law was not mentioned in the said substitution petition and consequently dismissed the appeal in toto finding it abated.

5. Being aggrieved and dissatisfied with the aforesaid order of the court below, the appellants have preferred this miscellaneous appeal.

6. It is submitted by the learned counsel for the appellants that all the four appellants had purchased the property in question by common sale deed. Hence, they have common interest in the property in question and their share have not been defined as yet. They had filed common written statement in title suit and after decree of the said suit, they had also filed joint title appeal in the court below. It is further submitted that all the four appellants happen to be own brothers having common interest in the property in question and one brother represents the estate of another brother and on account of death of appellant nos. 1 and 2, their estate does not remain unrepresented rather properly represented by the appellant nos. 3 and 4 and moreover, the appeal has not been abated by non-bringing on record legal heirs of appellant no. 1 rather of appellant no. 2 only. Heirs of deceased-appellants have no different interest in the property in question and moreover the aforesaid heirs have not filed any petition for making them party in the appeal under Order 1 Rule 10 CPC. It is further submitted that in the substitution petition though the provision of law has not been mentioned, but the said substitution petition does not by any stretch of imagination can be treated as a petition under Order 1 Rule 10 CPC as the heirs of the deceased-appellants, who have gone in collusion of the respondents are prayed to be made as respondents in the appeal. It is further submitted that as two brothers have already represented the estate of the deceased, hence, appeal does not stand abated and as the appeal has not been abated, so there is no question of filing any petition for setting aside the abatement. It is further submitted that merely due to not filing of petition under Order 22 Rule 9(2) CPC

for setting aside the abatement, the appeal ought not have been dismissed merely on hyper technicality. Learned counsel for the appellants has placed reliance upon the Full Bench judgment of this Court rendered in *Yogendra Bhagat & Ors. Vs. Pritlal Yadav & Ors.* reported in 2009(3) PLJR 697 and *Sudama Devi and Others, V. Jogendra Choudhary and others* reported in AIR 1987 Patna 239 and *Ram Niranjana Das and Another V. Loknath Mandal and Ors.* reported in AIR 1970 Patna 1(V 57 C 1) in buttress of his argument.

7. On the other hand, it is submitted by learned counsel for the respondents that under Order 22 Rule 3 CPC, on death of the appellant no. 2, the right to sue does not survive and as the heirs of the appellant has not been brought on record within the stipulated period of limitation, the appeal stood abated. It is further submitted that as the appeal stood abated, the appellants ought to have filed petition for setting aside the abatement under Order 22 Rule 9(2) CPC, but as no such petition was filed by the appellant, hence, the abatement was not to be set aside. It is further submitted that the aforesaid substitution petition filed by the appellant nos. 3 and 4 is actually not the petition under Order 22 Rule 3 CPC rather petition under Order 1 Rule 10 CPC which is not maintainable in the eye of law and has rightly been rejected by the court below.

8. From perusal of record, it appears that the substitution petition for appellant no. 1 has already been allowed by the court below vide order dated 20.12.2001, but the heirs of the appellant no. 1 has not been incorporated in the memo of appeal either by the appellants or by their learned counsel, but mere non-incorporation of name of heirs of deceased-appellants in the memo of appeal which happens to be mere ministerial work in my considered opinion, does not amount to non-substitution of the heirs of the appellant no. 1 in view of the aforesaid order of the court. Moreover vide impugned order, the appeal did not stand abated against the appellant no. 1 rather only against the appellant no. 2.

9. From perusal of record, it appears that defendant nos. 1 to 4 happens to be full brothers. They had purchased the property in question by common sale deed and defendant nos. 1 to 4 putting appearance in the case filed joint written statement and after decree of the said title suit, assailing the judgment and decree, the aforesaid four appellants had filed joint appeal. As the aforesaid four brothers i.e. appellant nos. 1 to 4 had purchased the property in question through common sale deed, their share in the property in question is not defined and each of the aforesaid brothers on demise of another, represents the estate of the deceased-brother. As the appellants no. 3 and 4 are on record, as per the doctrine of representation they would represent the estate of deceased-appellant no. 2 and in case of death of appellant no. 2 and non-substitution of his heirs on record, the estate of deceased-appellant no. 2 does not remain unrepresented rather represented by appellants nos. 3 and 4. Hence, there is no question of abatement of the appeal in view of the doctrine of representation.

10. Hon'ble Apex Court in *Yogendra Bhagat & Ors.* (supra) has been pleased to rule that in an appeal arising out from a decree passed in a suit for obtaining

possession by ejecting trespassers, if one of the co-owner-respondents (plaintiffs) dies during the pendency of the appeal then in presence of other other co-owners-plaintiffs, the whole appeal would not abate. The word 'legal representative' is inclusive in character and its scope is wide, it is not confined to a preferred class of heirs only but also includes even intermeddlers some of the plaintiffs apart from being co-owners, are brothers also and even if they are Class-II heirs, they being intermeddlers to the estate of deceased also represent him. Hence, there is no question of abatement of entire appeal. Hon'ble Apex Court in *Sudama Devi & Ors (supra)* has been pleased to rule that in a partition suit father and minor son were parties to the suit. Suit decreed during pendency of the appeal by defendants, minor died and mother who was Class I heir of deceased not brought on record within time. It was held by the Full Bench of this Court that the appeal did not abate as father became his legal representative as intermeddler on minor's death. Intermeddler to the estate of the deceased can represent him as his legal representative as per the wide spectrum definition of legal representative, provided in Section 2(11) of the Code.

11. From perusal of record, it appears that in the petition dated 04.02.2011 filed by the appellant nos. 3 and 4, the provision of law has not been mentioned, but in my considered opinion not the provisions of law rather contents and substance of the petition is to be considered at the time of its disposal and from perusal of the contents and substance of the said petition, it appears that the said petition has been filed for substitution of the heirs of the appellant nos. 1 and 2. Said petition has not been filed by the heirs of the appellant no. 1 and 2 for their impleadment in the memo of appeal under Order 1 Rule 10 CPC. The said substitution petition by no stretch of imagination can be treated to be a petition under Order 1 Rule 10 CPC rather petition under Order 22 Rule 3 CPC.

12. As per the case of the appellants, heirs of the appellant nos. 1 and 2 went in collusion with the respondents and they have not given their power to file the appeal. As the heirs of aforesaid appellant nos. 1 and 2 went in collusion with respondents, the appellants have left with no option but to get them impleaded as respondents in the appeal to avoid the further complication and lacuna in the appeal. It is settled principle of law that even a co-sharer can file a suit or appeal alone in case of denial by other co-sharer to join the suit or appeal making them defendant or respondent as the case may be and the prayer made by the appellants in the aforesaid petition to implead the heirs of appellant nos. 1 and 2 as respondents in the appeal, in my considered opinion, appears to be proper, legal and valid.

13. In the facts and circumstances of the case, I find and hold that the impugned order dated 20.08.2011 passed by the learned court below dismissing the application of the appellant nos. 3 and 4 for substitution of the heirs of appellant nos. 1 and 2 in the memo of appeal as the respondents and declaring the appeal abated and consequently dismissing it in toto is wrong and bad in law and not sustainable and is set aside. Accordingly, this miscellaneous appeal is allowed.