Brij Jivan Lal and anr. Vs. Shiam Lal and ors.

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Court : Allahabad

Decided On : Aug-10-1949

Reported in : AIR1950All57

Judge : Wanchoo, J.

Acts : Code of Civil Procedure (CPC) , 1908 - Sections 2(2) and 96 - Order 22, Rule 3

Appeal No. : Second Appeal No. 1742 of 1941

Appellant : Brij Jivan Lal and anr.

Respondent : Shiam Lal and ors.

Advocate for Def. : S.C. Das, ;J.P. Bhargawa and ;R. Mittra, Advs.

Advocate for Pet/Ap. : C.S. Saran, ;J.N. Chaterji and ;P. Banerji, Advs.

Disposition : Appeal allowed

Judgement :

Wanchoo, J.

1. This is a second appeal by Goswami Brij Jiwan Lal and another against the order of the Civil Judge of Mathura.

2. The facts are that a suit was brought by Goswami Brij Jiwan Lal and another against Goswami Chagan Lal and others in 1933 in the Court of the Munsif of Mathura which was numbered as suit No. 319 of 1933. One of the plaintiffs of that suit died and no application was made, within ninety days of the death of the deceased plaintiff, to bring his heirs on the record. One of the defendants also died and in his case as well no application was made within the time allowed by law to bring his heirs on the record. Thereupon an application was made, on behalf of the main contesting defendants in the suit, pointing out that the suit had abated. The fact that one of the plaintiffs and one of the defendants had died more than ninety days before the application was made and that their heirs had not been brought on the record is not in dispute. The Munsif, after hearing both, parties on the application of the defendants, held that the suit had abated in its entirety on, the ground that the right to sue did not survive of the remaining plaintiff alone. He, therefore, dismissed the suit on the ground of abatement with costs to the contesting defendants. On appeal, the Civil Judge, held that no appeal lay and, therefore, dismissed it. The plaintiffs appellants have come up in appeal from this order The only point for decision, therefore, in this appeal is whether an appeal lies in such circumstances. If

that is so, the matter will have to be remanded to the lower appellate Court for decision of the appeal on merits.

3. It is admitted, on behalf of the appellants, that there are certain authorities of this Court which lay down that no appeal lies in a case where the suit has been dismissed on the ground of abatement. It is, however, urged that the facts of the present case are distinguishable from the facts of the cases decided by this Court and that, in any case, the matter requires review in view of the pronouncements of the other High Courts on the earns question. There is, of course, no provision under Order 43, Rule 1, Civil P. C. for an appeal against an order dismissing the suit on the ground that it has abated. The contention, on behalf of the appellants, is that the order of the trial Court amounted to a decree and, therefore, an appeal would lie under Section 96, Civil P. C. Learned counsel urges that a distinction has to be made between those orders dismissing the suit for abatement, which are merely orders and, therefore, cannot be appealed against in view of the fact that there is no provision in Order 43, Rule 1, and those orders of abatement which amount to a decree and are, therefore, appealable, It is contended that there exists a distinction which has been drawn by other High Courts and which does not appear to have been considered in the reported cases of this Court.

4. The earliest case of this Court is Hamida Bibi v. Ali Husen Khan, 17 ALL. 172 ; (1895 A. w. n. 42, decided by a Bench of two Judges. In that case, the plaintiff had sued for recovery of her dower debt, but died shortly after the filing of the suit. A number of adjournments were allowed for the purpose of bringing the heirs of the deceased plaintiff on the record. In January 1894 one Mt. Hamida Bibi, the mother of the plaintiff, applied to be brought on the record as her legal representative in respect of a part of the suit. That application was rejected on the ground that it did not contain a schedule of properties and was not signed and verified. Then in May 1894 Mt. Hamida Bibi again made an application to be brought on the record as an heir of the deceased plaintiff. This application was again rejected on the ground that it was not signed and verified and also because it was beyond time. Hamida Bibi then appealed to this Court. A preliminary objection was taken that no appeal lay. It was argued for the appellant that the order amounted to a decree as it disposed of the plaintiff's claim as completely as if the suit had been dismissed. This contention was repelled and it was held that as there was a provision allowing a person, claiming to be a representative of the deceased to apply for an order to set aside the order of abatement, it cannot be said that an order under para, 1 of Section 96 of the then Civil P. C. was an adjudication deciding the suit or appeal, particularly as an appeal was provided against an order refusing to set aside an abatement.

5. This case differs from the facts of the present case on two points. In the first place, there was no decision in this case that the light to sue did not survive. Secondly, in this case, the plaintiff who died was the sole plaintiff and there was, therefore, no question of a decision whether the right to sue survived to the remaining plaintiffs alone. It is also doubtful whether on the facts of the case like the present, it would be possible for the plaintiffs-appellants to make an application for setting aside the order of abatement passed on an application of the defendants after hearing both the parties.

6. The next case is that of Walayat Husain v. Ram Lal, 12 A. L J. 1113 : (A. I. R. (1) 1914 ALL. 402). In this case, it was held that an order directing the abatment of a suit is not a decree within the meaning of that term as defined in the Code of Civil

Procedure and no appeal lies against such an order declaring a suit to have abated. The facts of this case were that the sole plaintiff died during the pendency of the suit. His heirs were not brought on the record within the time allowed by law and the trial Court, therefore, held that the suit had abated, but it gave no costs to the defendant. Thereupon the defendant appealed from the order disallowing costs to him. The lower appellate Court allowed costs to the defendant and allowed the appeal and thereupon there was a second appeal to this Court. In this case also, it should be noticed that there was a sole plaintiff and there was no question whether the right to sue survived to the remaining plaintiffs alone. The order of abatement appears to have been passed in the ordinary course when the heirs of the plaintiff were not brought on the record within the time allowed by law. In this case, therefore, there could be an application by the heirs of the plaintiff for setting aside the abatement.

7. The other case is Muhammad Ismail v. Manohar Das, 20 A. L. J. 214 : (A. I. R. (9) 1922 ALL. 113). The judgment, in this case, merely relies on the two cases mentioned above. The circumstances, under which the District Judge had declared that an appeal pending before him had abated, do not appear from the judgment and, as such, this case is not of much help.

8. The last case is Moti Lal v. Bishambhar Nath : AIR1925All431 . In that case, an ex parte decree had been passed against the defendant. He applied for setting aside the ex parte decree. While that application was pending, he died. Thereupon his son applied to be brought on the record as the legal representative of the deceased applicant. The plaintiff objected that by a certain oral will, the deceased Chunnu Lal had directed that the litigation should be put an end to and the decree passed against him should be accepted. It was urged, therefore, that the cause of action did not survive to Bishambhar Nath, son of Chunnu Lal, and he could not be brought on the record as the legal representative and heir of Chunnu Lal, the deceased defendant. The first Court, however, repelled this contention and brought Bishambhar Nath on the record as an heir of his deceased father, Chunnu Lal. There was an appeal against this order. It was then held that no appeal lay from such an order. This case does not appear to me to be directly in point for the Court did not decide that the suit had abated. At the best, it holds that when the Court decides that there is no abatement, there is no appeal at that stage, presumably because the matter may be agitated when appeal is preferred against the decree that will be finally passed.

9. A perusal o these four cases shows that they are clearly distinguishable from the case before me. The main point of distinction is that in the present case, there were other plaintiffs besides the plaintiff who had died and the Court, when it held that the suit had abated, definitely decided the question that on the death of one plaintiff and the failure to bring his heirs on the record, the entire suit had abated. I do not think that it can be said that these four cases lay down that whenever there is an abatement for any reason and under any circumstances there can be no appeal because Order 43, Rule 1, Civil P. C., does not provide an appeal from such an order. Nor can it be said that these cases lay down that no order declaring that a suit had abated can ever have the force of a decree. It seems to me, therefore, that where an order, to the effect that the suit had abated in its entirety, amounts to an adjudication of the rights of the remaining plaintiffs as in the present case, it will amount to a decree which would be appealable under Section 96, Civil P. C. That such a distinction exists will be clear from the trend of authorities of other High Courts which are of a date later than that of the decision in Moti Lal v. Bishambhar Nath : AIR1925All431 . In Raja Rampal Singh v. Abdul Hamid, 3 Luck. 628: (A. I. R. (15) 1928 Oudh 362), a

Full Bench of the then Chief Court held that where on the death of a plaintiff, his heir applied under the provisions of Order 22, Rule 3, Civil P. C., to be entered as a legal representative of the deceased and to continue the suit and the Court, while recognising him to be the legal representative of the deceased, arrived at the conclusion that the right to sue had come to an and with the death of the deceased and decided under the provisions of Order 22, Rule 1, Civil P. C., that the suit had abated, the decision was a final adjudication which determined the matter in regard to the controversy in suit and the order giving effect to this decision was a decree within the meaning of Section 2(2), Civil P. C. and an appeal lay against it.

10. In Sabitribai Debi v. Jugal Kishore : AIR1938Cal639 , the facts were that the heirs of certain pro forma respondents were not brought on the record. These respondents should really have been the appellants, but as they did not appeal, they had been made pro forma respondents. They were also pro forma defendants in the suit because they had not joined the plaintiffs in bringing the suit. The appellate Court held that the appeal had abated in toto because of the death of certain respondents. It was then held that such an order came within the definition of 'decree' and, as such, was appealable.

11. Lastly I may refer to the case of Ram Charan Das v. Hira Nand, I. L. R. (1946) 27 Lah. 427 : (A. I. R. (32) 1945 Lah. 298 P. B.). This case came before a Full Bench of the Lahore High Court. The facts were that one Hira Das brought a suit against Mohammad Niwaz Khan and others for ejectment from a certain house. The suit was decreed and the defendants appealed and that appeal was dismissed. Later one Bharat Das brought a suit against Hira Das, plaintiff of the previous suit, and Mohammad Niwaz Khan and others, defendants of the suit for a declaration that the decree obtained by the plaintiff of the previous suit was inoperative and ineffectual against Bharat Das and prayed for an injunction against Hira Das on the ground that Bharat Das was in possession of the house. Bharat Das's suit was as a shebait and manager of a temple and the house was said to belong to the temple. Later, a petition of compromise signed by Bharat Das and Hira Das was filed, but Hira Das filed a written statement repudiating the compromise and alleging fraud against Bharat Das. An issue was framed to the effect whether the suit had been settled between the parties by means of a lawful compromise. While evidence was being recorded on this issue, Bharat Das died on 12th November 1940. Proceedings then came to a stop pending an application under Order 22, Rule 3. On 10th February 1941, Ram Charan Das made an application under Order 22, Rule 3, Civil P. C., and claimed to be the legal representative of Bharat Das. An issue then arose whether Ram Charan Das was the legal representative of Bharat Das. The Court held that Ram Charan Das was not the legal representative of Bharat Das and that even if he was, the right to sue did not survive to Ram Charan Das. Ram Charan Das went in appeal which was dismissed. Thereafter there was a second appeal to the High Court. Two questions were referred to the Full Bench: (1) Whether the order of the learned trial Judge rejecting the application of Ram Charan Das on the ground of his not having been proved to be the legal representative of the deceased Bharat Das, was itself open to appeal? (2) 'Whether, if the first question is answered in the negative, it should make any difference to the decision of the question of the competency of the appeal that the learned trial Judge also gave another ground for the rejection of the application of Ram Charan Das, namely, that the right to sue did not survive after the death of Bharat Das ?

12. Reliance was placed on an earlier Full Bench decision of the Chief Court of

Punjab in Niranjan Nath v. Afzal Hussain, 34 I. C 822: (A. I. R. (3) 1916 Lah. 246 F. B.). It was pointed out in this case that there was a difference between orders of abatement which were passed as a pure formality recognizing the abatement which is fait accompli and other orders of abatement where the abatement did not take place ipso facto, but on the decision of the Court directing the abatement of the suit on the ground that the right to sue did not survive. In the latter category of orders, there is a decision of the Court and it is not open to a party to apply for setting aside the abatement and thereby get a right of appeal, if his application is refused. The Full Bench, therefore, decided that where an application is dismissed on the ground that the applicant had not been proved to be the legal representative, the order will not be open to appeal and in such a case the fact that another ground, namely, that the right to sue did not survive would make no difference to the competency of the appeal, But where the only ground, on which it was held that the suit abated, was that the right to sue did not survive to the heirs of the sole plaintiff or to the remaining plaintiffs -- in case there are more plaintiffs than one -- there would be a right of appeal as the order will amount to a decree.

13. It seems to me that the distinction drawn in these cases is a very real one and should be drawn. In the first three cases of this Court, which are the only ones really dealing with the question of abatement, this point whether a distinction should be drawn between those cases of abatement where it is due to the failure of the heirs being brought on the record within the period allowed by law or due to the Court deciding that a particular applicant is not the legal representative, and those cases where the abatement is due to the Court deciding that the right to sue does not survive was not considered. In the latter class of cases, there is to my mind a decree meaning thereby a formal adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit. The present case falls under the latter category, while the three cases of this Court referred to earlier are apparently of the former type and, therefore, the order passed by the Munsif dismissing the suit amounted to a decree and was appealable. The order of the Civil Judge must, therefore, be set aside and this appeal remanded for rehearing.

14. I, therefore, allow the appeal, set aside the order of the Civil Judge, dated 6th October-1941, and remand the appeal to the Court of the-Civil Judge, Mathura for disposal on the merits. Costs throughout will abide the final result.

15. Leave to appeal under the Letters Patent is granted.