Ahmad Abdulla and anr. Vs. Ayesha W/O Allabux and ors.

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Court : Madhya Pradesh

Decided On : Sep-24-1962

Reported in : AIR1963MP282

Judge : V.R. Newaskar and ;P.K. Tare, JJ.

Acts : Code of Civil Procedure (CPC) , 1908 - Order 20, Rule 18 - Order 22, Rules 4 and 11

Appeal No. : Letters Patent Appeal No. 4 of 1961

Appellant : Ahmad Abdulla and anr.

Respondent : Ayesha W/O Allabux and ors.

Advocate for Def. : D.C. Bharucha, Adv.

Advocate for Pet/Ap. : S.L. Sanghi, Adv.

Disposition : Appeal allowed

Judgement :

Newaskar, J.

1. This is an appeal under Clause 10 of the Letters Patent of this High Court and is directed against the decision of Sen J., who considered the effect of omission to bring on record the legal representatives of one of the plaintiffs in a suit for partition at the stage of appeal where the parties were Mohammedans. The question arose after the passing of the preliminary decree by the High court in second appeal on an application submitted on behalf of the defendants dated 30-12-1955 contending that the preliminary decree was null and void due to the aforesaid emission. The trial Court considered the omission to be not fatal to the decree so as to make it null and void. It consequently passed a final decree for partition. On appeal by the defendants the appellate Court upheld the defendant's contention and set aside the final decree further holding that the preliminary decree was a nullity. Sen J., in second appeal against that decision upheld the decision and dismissed the appeal but granted leave. Present appeal is consequently filed.

2. Material facts are as follows:

One Pirbux owned a house in Pinjarwadi Jaora. He left behind two sons Noor Mohammad and Aliabux and a daughter Sakina. These three children of Pirbux died in succession. First to die was Allabux leaving behind him his widow Ayesha and no

issue. Subsequent to him died Noor Mohammad without leaving any widow or child. Sakina died last leaving behind her two sons Kasam and Ahmad and a daughter Nasiban. Thus on the death of all the three children of Pirbux the only persons left to claim the property in dispute were Ayesha on the one hand, Kasam, Ahmad and Nasibanon the other. Ayesha made a gift of the entire house in favour of one Abdul Majid who in his turn mortgaged the same with Khudabux and Wali Mohammad. Thereupon Kasam, Ahmad and Nasiban filed the present suit for partition im-pleading Ayesha as defendant No. 1 and the transferees Abdul Majid Khudabux and Walimohammad as defendants No. 2, 3 and 4. The suit was resisted by the defendants. At the hearing Kasam changed front and made a statement on 9-12-1950 supporting the defendants that the 11 Chasma house in Pinjarwadi belonged exclusively to Ayesha and that he did not want to claim any share in that house. Ahmad and Nasiban preferred appeal against this decision.Kasam did not join in this appeal. He was consequently made a co-respondent. This appeal was also dismissed. ASecond appeal was thereafter taken to the Madhya Bharat High Court. Some time during the pendency of this appeal Kasam died. However neither th'e appellants nor the rest of the respondents brought this fact to the notice of the High Court.

The second appeal was consequently heard in the absence of legal representatives of Kasam and without their being brought on record. It was allowed and a preliminary decree was passed on 27-8-1955. After this when the case wentback to the trial Court in connection with the proceedings for the final decree an application was submitted on behalt of the defendants on 30-12-1955 contending that the suit had wholly abated due to death of Kasam during the pendency of the appeal and without his legal representatives being brought on record and the preliminary decree passed against them was a nullity. Ignoring this application the trial Court (Mr. Durvey) passed final decree. The deten-dants again appealed against that decree and the appellate Court remanded the case for consideration of the application dated 30-12-1955. The trial Court held that the preliminary decree was not a nullity since there could be no total abatement for failure to implead legal representatives of a pro forma respondent. Mr. Chandnani who was then trying the case accordingly, again passed a final decree in the same terms as had been passed by Mr. Durvey. me defendants again appealed.

The appellate Court, however took a contrary view and held that the suit had wholly sbated and the preliminary decree was a nullity. The final decree passed by the trial Court was consequently set aside. The plaintiffs Ahmad and Nasiban appealed. Sen)., who heard the appeal dismissed the same. Principal ground in which Sen J., proceeded was that a case for partition has its own peculiar features, tie observed:

'Whether it is a partition amongst the Hindu coparceners or Mohammedan' co-sharers, all parties interested must be in Court. This principle has well been settled Dy the Division Bench of the Nagpur High Court in Malobi v. Gous Mohammad, AIR 1949 Nag 91 which has dealt witn a case of Mohammedans.'

3. The learned Judge repelled the contention put on behalf of the plaintiffs Ahmad and Nasiban that they were not claiming anything from Kasam or his legal representatives, that the only effect of Kasam's death would be to augment their own share to a certain extent and that ttiiswould not lead to inconsistent decrees. According to the learned Judge

'in a suit for general partition it is immaterial who are the plaintiffs and who are the defendants. Each party whether a plaintiff or a defendant has general right to

proceed with the case. If the plaintiff becomes negligent his place may be taken by the defendant. Hence foregoing of interest by a plaintiff is not material'.

Further contention that the preliminary decree which had not been successfully assailed by means of appeal or otherwise could not be touched at the stage of proceedings tor a final decree was also rejected on the ground that if on. the death of a party his legal representatives are not brought on record within the time, allowed by law the suit abates automatically with reference to the party who has died and no order tor a declaration to that effect is needed and where there is such abatement and the position with reference to the remaining parties be such that it is not possible to proceed as between them then the suit would abate as a whole.

4. In spite of taking this view relying upon the decision in AIR 1949 Nag 91 Sen J., granted leave.

5. Mr. Sanghi who appears for the appellants contends that after a preliminary decree had been passed by a Court in ignorance of the fact of death of a party certain rights accrue and it is not open for a Court to ignore the said decree and refuse to pass a final decree merely because the legal representatives of the deceased party had not been brought on record within the period allowed by law. He relies upon the decision reported in AIR 1959 Bom 384, Raddulal v. Mahabir Prasad. Another ground on which ne seeks to assail the decision is that although a decree passed against a party who is dead without bringing on record his legal representatives within the period allowed by law may not be good such decree in his favour is not bad and it is competent for the legal representatives to take benefit under it. For this view the learned counsel relies upon the decision reported in AIR 1954 Cal 205, Himangshu v. Manindra Mohan. He further refers to Mulia's Mohammedan Law page 33 of 15th edition under the heading Necessary Parties.

6. On the other hand Mr. Bharucha tor the respondents contended that in a suit for partition between Monam-medan co-sharers each one of the persons entitled to a share is a necessary party and in the absence of any party no effective decree for partition and separation of the share of the plaintiff can be passed. When therefore, according to him, one of the co-sharers has died and the names of his legal representatives are not brought on record the appeal abates as against him and since it is not possible to allot to the plaintiff a specified share without affording opportunity to the legal representatives of the deceased respondent to object to such allotment the decree becomes a nullity and can be assailed any time. The learned counsel relied upon the decisions reported in AIR 1949 Nag 91, and AIR 1953 Nag 12 Lilawati Bai v. Gangadhar.

7. It is not necessary to refer to the other contention of Mr. Bharucha in detail pertaining to remand and in support of which he relied upon the decisions in 1958 Jab LJ 349 ; (AIR 1959 .Madh Pra 181) Kaluram v. Mentabbai, AIR 1931 PC 197, Zahirulsaid v. Lachhmi Narayan and AIR 1917 All 148; Islam Fatima v. Zainuddin, as the point has no bearing on this appeal and is without substance. It is enough to say that the remand order was for consideration of the application of the respondent dated 30-12-1955 pertaining to the fact of death of Kasam and its effect. The only point which cannot be assailed as a result of this remand order is the propriety of consideration of the application dated 30-12-1955 and nothing else. The trial Court considered the objection contained in that application and overruled it and passed a final decree. That decree was set aside as the appellate Court allowed the objection

to prevail. In this appeal correctness of the view taken by the lower appellate Court can certainly be considered.

8. The only question to be considered therefore is whether the view taken in this case that the suit had wholly abated owing to the circumstance that when the preliminary decree had been passed Kasam had died and his legal representatives had not been brought on record witn-in limitation and that consequently the preliminary decree had been rendered null and void, is correct or not.

9. This question has two different aspects. First is that admittediy a preliminary decree had been passed in this-case in favour of all the plaintiffs namely the appellants Ahmad and Nasiban as well as Kasam. Whether the validity of this decree can be assailed collaterally in the present proceeding for a final decree without seeking to set it aside either by means of an appeal or review? second is whether it is at ail correct to say that the suit had wholly abated automatically because this is a suit by Mohammedan co-sharers for their share out of the property left by the deceased predecessor against persons in actual possession of the property?

10. As regards the first question the contention is that it can be so assailed at every stage including that of the final decree as also that of execution because the decree thus passed in face of automatic abatement is a nullity.

11. Now this contention as to automatic abatement of the whole suit involves certain factual assumptions. One is that Kasam died before the preliminary decree and during the pendency of the appeal in the High Court Second is that the suit could not proceed in the absence of the legal representatives of deceased Kasam. These are questions of fact, the first as to the date of fleam and the second as to the nature of the action and when a preliminary decree 13 passed without objection as to these having been raised they are impliedly concluded by that decree. It may be that such a decree could have been assailed by means of an appeal or a review petition but it cannot be said to be a decree passed without jurisdiction.

Supposing the question as to the fact of death of Kasam had been raised before that very Court by means of a Review petition and the Court had come to a conclusion that he had not died before the preliminary decree would it still have been possible to contend that the preliminary decree is a nullity because in fact he had died before? It may be that in such a case the court might make an error in finding that the death did not occur after the preliminary decree but that is not the same thing as acting without jurisdiction. It is no doubt true that no order of a court is needed to bring about abatement of a suit or appeal when the period provided by law for bringing on record the legal representatives of a party has elapsed and abatement is automatic. But when a decree is passed and it is contended at the post-decree stage that decree is not rightly passed because of a factual circumstance then that cannot be permitted collaterally. An appropriate proceeding designed far setting aside the decree erroneously passed is necessary.

In AIR 1959 Bom 384 (supra) the facts were that in a suit for foreclosure a decree was passed in ignorance of the death of one of the plaintiffs. On an application submitted for making the decree final the defendants contended that the preliminary decree was a nullity due to the death of one of the plaintiffs. It was held by Mudhol-kar and Badkas, JJ., relying upon the decisions of their Lordships of the Privy Council in AIR 1924 PC 198, Lachmi Narain v. Balmakund and 27 Ind App 216 (PC),

Malkarjun Shidramappa v. Narhari Shivappa, that it was not open for the court dealing with the application for final decree to take notice of the matters prior to the stage of preliminary decree and to treat that decree as a nullity on its finding as to them. Their Lordships observed at page 385:

'It will be clear from these provisions that the Court has to find the following facts: (i) that one of several plaintiffs had died and (ii) that the right to sue does not survive to the surviving plaintiff. The question as to when a plaintiff died is one of fact and has to be alleged and proved. Similarly, the question whether the right to sue does not survive to the surviving plaintiff is also one of fact and has to be decided by the Court. Now, unless these questions are raised before a court at the appropriate time, it is not possible for it to decide them, if in such a case the court proceeds with them. If in such a case the court proceeds with the case in ignorance of the fact of the death of a person and passes a decree, that decree cannot be treated as a nullity. It may be wrong decree but it will have to be set aside by taking appropriate proceedings as would have been the case had the points been raised but wrongly decided by the court. It cannot be simply ignored nor can the court refuse to make it final. As already pointed out, where a decree is passed by a court certain rights accrue to the party in whose favour the decree has been passed and those rights cannot be set at naught except by following 'the procedure which is by way of an appeal or a review.'

12. Almost similar observations are made by P. N. Mookerjee J., in AIR 1954 Cal 205. In that case the question arose at the stage of execution, In that case no doubt Order 22 Rule 2 C. P. C. was also held applicable on the facts found therein.

13. Even on the assumption that the Court can consider the. propriety of the contention as to the void character of the decree. owing to the fact of Kasam's death before the preliminary decree, the point next to be considered is whether the preliminary decree is void.

14. In this connection we may refer to the decision of the Privy Council in 67 Ind App 406 : (AIR 1940 PC 215), Mahomedally v. Safiabai. The facts material for our present purpose of that case are as follows: One Satia-bai brought a suit claiming a share in the estate left by her maternal uncle Ebrahimji through his mother Jemmboo. She sought a declaration that Jelumboo was entitled to 1/6th share of Ebrahimji's estate at the time of her death and prayed that the said share might be ascertained by the court and be divided amongst Jelumboo's heirs. The suit was filed on 23-7-30. Sakinaboo one of the sisters or Ebrahimji died on 14-3-1932 leaving her daughter Kukmaboo as her heir. No application was made to bring her on record within limitation. The suit consequently abated as against Sakinaboo. No application for setting aside abatement was made either, under Order 22 Rule 9. But later on on 10th of May 1936 Rukhiaboo applied to be impleaded claiming her share in the estate through Sakinaboo. She was allowed to be impleaded in pursuance of Court's power under Order 1 Rule 10.

Later the suit was dismissed as barred under Article 106 of the Limitation Act. But on appeal the Division Bench of the Bombay High Court set aside the judgment and directed that the estate of Ebrahimji be applied in dun course of administration. One of the contention raised in the appeal before the Privy Council was that the suithad wholly abated as it had abated against Sakinaboo. Their Lordships repelled the contention. They observed :

'On the first point their Lordships are of opinion that it is impossible to hold that the suit for administration of Ebrahimji's estate came to an end by reason of abatement as against Sakinaboo. Sakinaboo and her daughter Rukha-boo are persons hawing the same interest as the plaintiff and though the plaintiff by reason of laches may be supposed in certain circumstances to lose her rights as against them, it is paradoxical to suppose that the plaintiff's laches have deprived them of rights. There is nothing in Order 22 to take away their interest in the estate of Ebrahimji and they could (so far as that order is concerned) have brought an administration suit of their own, notwithstanding any abatement of the plaintiff's suit. The presence of someone to represent Sakinaboo's interest was very proper and highly desirable in the interest of every other party, but it is putting it too high to say that the suit could not' possibly go on without her. It not uncommonly happens, in a suit for administration that for one reason or another a particular interest is not represented before decree, but is either provided for by the decree, or is asserted at a later stage under the decree or is given effect by a party being permitted to attend certain accounts and inquiries so as, to be bound by the result. Still it would have been very bad practice if in the present case Rukhiaboo had not been joined as a party and this was properly done by Barlee J. on her own application under Order 1, Rule 10. Their Lordships are of opinion that it is open to the judge in his discretion under 0.1, Rule 10, to add as a party to the suit the representative of a person against whom the suit has abated for the purpose of giving effect to the rights of the parties. The contention that the plaintiff's suit had abated as a whole is fundamentally mistaken. It involves that the plaintiff was claiming relief against Sakinaboo, that because Sakinaboo's heirs were entitled to resist the grant of this relief in the present suit by reason of the plaintiff's laches, the plaintiff could not be given relief against the present appellants, no step in this reasoning can be justified.'

15. The observation in the concluding portion of the above quotation apply in this case because of the provisions of Order 22 Rule 11 C, P, C. Kasam was a co-respondent and occupied a position similar to that held by Sakinaboo in the appeal before their Lordships. Plaintiffs in the present case had not claimed any relief against Kasam. On the appeal preferred by them Kasam stood to gain and not to lose anything and in fact by reason of the success of the appellants' appeal before Samvatsar J., the legal representatives of Kasam actually gained and lost nothing They could not under the circumstance be held to be entitled to resist the grant of relief to the appellants and there was no impediment in the way of the appellants to obtain their relief as against the respondents who had the entire property with them.

It also seems that the earlier portion in the observations of their Lordships lends support to the first line of reasoning based on the decision in AIR 1959 Bom 384 (supra). From the decision of their Lordships it seems that in spite of the abatement of the appellants' appeal as against Kasam assuming him not to be a pro-forma respondent it was competent for the High Court to direct his legal representatives to be added in pursuance of the power of the Court under Order 1 Rule 10. Had the tact of Kasam's death been brought to the notice of Samvatsar J., identical decree in that case could have been properly passed. In that event it cannot be said that the constitution and continuance of the appeal was illegal as the proceedings had come to an end by reason of the abate-merit of the appeal, the High Court having no longer any jurisdiction to deal with the case. The decree granteo by Samvatsar J., under the circumstance cannot be said to be without jurisdiction and a nullity. In the circumstances the contention that the appeal before Samvatsar J. had abated as a whole is fundamentally mistaken to borrow the expression of their Lordships of the

Privy Council.

16. There is another way of looking at the matter in the circumstance of the present case, initially the suit was filed by the appellants and Kasam. He was consequently a party interested in the subject matter of the appeal his interest being similar to that of the appellants. But when it came to framing of issues he changed his attitude and sided with the defendants. The result of this attitude was that he admitted that he had no interest in the subject matter of the suit and wanted no relief against the defendant. When therefore after the dismissal of the suit without his formal transposition as a pro-forma defen-dant it came to filing of the appeal he was impleaded as a co-respondent since he did not join the appeal and the appellants claimed no relief against him and he too wanted no relief against the other respondents. His position was consequently no more than that of a pro-forms respondent. On that view there could be no abatement of the appeal as a whole, vide AIR 1938 Cal 639, Sabitribai v. Jugal Kishore, AIR 1950 Mad 482, Subba Naidu v. Kannia Naidu and AIR 1952 Nag 250 (251), Shamoo Laxman v. Bhaojee Tukaram.

17. It remains to consider the decision of the Nag-pur High Court reported in AIR 1949 Nag 91, and AW 1953 Nag 12, upon which Sen J., relied.

18. In the first case it is no doubt held that in a suit for partition, all interested in the properties are necessary parties. The reasons suggested for this is that the share to which a person is entitled can be determined only in the presence of all the persons interested in the pro-perties and that no final and effective partition regarding allotment of properties is possible unless it is made in the presence of all persons interested. It was accepted in that case on reference to the provisions of Order 22 Rules 3 and 11 that the answer to the question whether on failure to bring the legal representatives of a deceased party to an appeal operates as an abatement of the entire appeal or the appeal operates partially as against the deceased party, cannot be found in the provisions of the Civil Procedure Code regarding abatement and for that purpose we have to resort to general principles and the provisions of the substantive law. These principles are-

(1) It should be possible to give effect to the rights of the parties left actually before the Court even without the presence of legal representatives of the deceased party.

(2) The Court would not pass a decree which will be rendered infructuous and incapable of execution.

(3) The effect of not bringing on record the legal representatives of a deceased party should not lead to two contradictory decrees.

19. The case of a suit for dissolution and partnerships account as between partners of a firm was considered to be in point. In such a case it was held by their Lordships of the Privy Council in 31 Ind App 71 (PC), Raj, Chunder Sen v. Gangadas Seal, that in the absence of a legal representative of deceased respondent who was a partner, the appeal against the decree for accounts and dissolution of partners could not proceed and cannot be said to be properly constituted. Now a suit for dissolution and accounts as between partners constituting a firm is not akin to a suit by a Mohammedan co-their for division of properties left by a deceased person against the other co-heirs and for securing his share. Whereas in the former case in the absence of a partner or his legal representatives a proceeding is idle and fruitless and no effective decree can

be passed that may not be so in the latter case.

The decision in AIR 1935 All 110, Zabaishi Begam v. Naziruddin Khan, was distinguished in that case on the ground that in that case suit was not for partition and separate possession but it was for the possession of a share. But in the' case before their Lordships of the Privy Council in 67 Ind App 406 : (AIR 1940 PC 215), Mahomedally v. Safiabai, the suit was for division of the share of a deceased Mahomedan woman out of the properties in the hands of other co-heirs. In that case then Lordships have not accepted the contention that the whole suit abated as one of the co-heirs had died and her legal representatives were added long after the period of limitation for bringing them on record had passed and even after the period for setting aside abatement had elapsed in pursuance of the power of the Court under Order 1 Rule 10 C. P. C. The point of distinction therefore is contrary to the decision of, the Privy Council. It was distinctly held in AIR 1935 All 110 that where a Mahomedan heir brings a suit for possession of a share against his coheirs in possession and omits to implead one of the co-heirs there is no reason why he should not gel so much of his share as is in the possession of the heirs who are parties. The reason suggested is that, in the case of Mohammedan dying intestate his heirs succeed in distinct shares so far his property is concerned.

19A. Thus for more reasons than one the decision in AIR 1949 Nag 91 cannot come in the way of the success of the appellants.

20. As for the case reported in AIR 1953 Nag 12, it seems that it arose out of a suit for securing a declaration that the transfer of property made by a widow in favour of two joint purchasers would not be binding upon the reversioners on the death of the widow. The plaintiff reversioner succeeded and the defertdants preferred appeal. During the pendency both of the appellants died. The legal representatives of one of them were brought on record within time while those of the other were not. It was contended on behalf of the respondents on record that the appeal abated as a whole. This contention was upheld. Obviously if the appeal had continued and succeeded resulting in the decision that the transfer was good and bound the reversioners there would be two contradictory decrees one in favour of the plaintiff reversioner due to abatement of the appeal as against the defendant transferee whose legal representatives had not been brought on record and the other in favour of the transferee whose legal representatives had been so brought. Obviously when such is the case there is total abatement.

21. In the present case there was no livelihood of two contradictory decrees being passed since interest of the appellants is distinct from that of Kasam and whatever might happen to that interest the appellants can certainly press their claim. Secondly if the appellants succeed and Kasam's claim stands dismissed the decree does not become incapable of execution. It was also possible to give effect to the rights of the appellants even without Kasam's legal representatives being there.

22. Thus having regard to the fact that the decree passed by Samvatsar J., cannot be said to be without jurisdiction and also having regard to the fact that even on assumption that due to automatic abatement of Kasam's claim the suit and the appeal with reference to that claim stood dismissed yet this ought not necessarily lead to the dismissal of the claim of the appellants who are entitled to their own share independently of Kasam.

23. The appeal therefore deserves to succeed. The decision of Sen J., is therefore set aside and the final decree passed by the trial Court in their favour is restored so far as they are concerned. They are entitled to the costs of this appeal as well as those of the court below.