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Court : Patna

Decided On : Feb-02-1999

Judge : Ravi Nandan Sahay, J.

Appeal No. : Appeal from Appellate Decree No. 205 of 1984

Appellant : Mushar Dusadh and ors.

Respondent : Radha Krishna Mahto @ Umesh Narain Mehta and ors.

Disposition : Appeal Allowed

Prior history : Ravi Nandan Sahay, J. 1. The only substantial question of law which arises for consideration in this appeal which was heard ex-parte against the respondents is whether the entire suit stood abated for a non-substitution of legal heirs of respondent No. 5, who died during the pendency of the suit? 2. Learned Munsif held that the suit abated as a whole since the interest in the suit property was joint with the deceased Respondent No. 5 and other defendants. Learned Munsif has considered the ques

Judgement :

Ravi Nandan Sahay, J.

1. The only substantial question of law which arises for consideration in this appeal which was heard ex-parte against the respondents is whether the entire suit stood abated for a non-substitution of legal heirs of respondent No. 5, who died during the pendency of the suit?

2. Learned Munsif held that the suit abated as a whole since the interest in the suit property was joint with the deceased Respondent No. 5 and other defendants. Learned Munsif has considered the question of abatement in Para-15 of the Judgment as extracted hereunder:

15. Issue No. 3:--Admittedly defendants 5 and 8 died two to three years back, and the heirs of defendant No. 5 have not been brought on record. Rule 4 of Order XXII, of the Code of Civil Procedure lays down that where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, the Court on an application made on that behalf shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit and that where within the time limited by law no such application is made the suit shall abate as against the deceased defendant. But it is a settled principle of law that such an abatement may under certain circumstances result in the whole and not as against the interest of the deceased defendant. If the interests of the deceased defendant are separable from those of the owners, the suit will abate in part to the extent of his interests, and if his interest is inseparable the suit will abate as a whole. The test is whether the right to be sued survives to the remaining defendant or defendants alone or not and this will depend whether separate suit could have been brought against all the defendants who have been sued jointly. In the present case it is obvious that separate suits could not have been instituted against all the defendants. In absence of one of the defendants the suit could have failed because in his absence the, decree could not be executed effectively and properly. Moreover, there is one thing more and that is passing of two inconsistent decrees In one and the same suit. In view of these facts, in my opinion, the suit has abated as a whole and not as against defendant No. 5 alone.

3. There can be no doubt that the learned Munsif applied correct test in determining whether the suit as a whole abated or only it abated against the heirs of deceased Respondent No. 5. Learned Munsif decided other issues also against the plaintiffs and in favour of the defendants-appellants.

4. The suit was filed by the plaintiffs for declaration of title and confirmation of possession in respect of S.P. No. 1552 along with S.P. Nos. 1585 and 1597 of Khata No. 70 situated at village Kasi Bahera in the district of Darbhanga. This land was recorded in the name of Babu Murli Lal Mahtha as his kast land in the cedestral khatian. The suit plot was, however, recorded in the name of Raghu Dusadh as Batai Agoria Sikmi and a separate Sikmi khata had been prepared. The said Raghu Dusadh used to work as watchman during his life time. After his death in the year 1907 Babu Murli Lal Mahtha resumed possession over the suit plot. According to the plaintiffs, after his death in the year 1925 his entire property including the suit plot came in possession of his brother and father of plaintiff No. 1 Manohar Lal Mahtha. Manohar Lal Mahtha also died leaving behind plaintiff No. and another son Ram Bahadur Mahtha and his widow Most. Bulkan Kuer. Ram Bahadur Mahtha also died after some time and the mother of plaintiff No. 1 came in possession of the family property including the suit land on behalf of the plaintiff No. 1, who was minor at that time. In the year 1932 she filed an application before the District Judge Darbhanga under the Guardians and Wards Act and with the permission of the Court she executed usufructuary mortgage deed in the year 1935 in respect of the suit land as well as other lands and after redemption of the mortgage, the mortgaged land came in possession of the mortgager. Thus, according to the plaintiffs, since 1907 the suit land was all along coming in possession of the finally of the plaintiffs.

5. A joint written statement was filed on behalf of the defendants, who are appellants here. The defendants pleaded title by adverse possession. They denied that the plaintiffs were ever in possession of the suit land. According to the written statement, Raghu Dusadh had three more brothers and a nephew. He died in the state of jointness with all those persons. After his death, other family members came in joint possession of all those lands. Their ancestor were recorded as Bataidar and not as Agoris Bataidar. It was claimed that the interest of the

defendants in the suit property was joint and indivisible. Learned Munsif, therefore, rightly held that the entire suit abated for non-substitution of deceased defendant No. 5 (Respondent No. 5).

6. Learned Subordinate Judge without commenting on reasoning of the learned Munsif, held that the suit abated only so far defendant No. 5 was concerned. Learned Subordinate Judge has not considered the question of abatement at all.

7. In the result, this appeal is allowed and the decree of the Subordinate Judge is set aside. The decree of the Munsif is restored.

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