

D'Souza Vs. Joseph

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Court : Karnataka

Decided On : Aug-26-1992

Reported in : ILR1992KAR2972

Judge : N.D.V. Bhat, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 21 Rule 32

Appeal No. : R.F.A. No. 67 of 1985

Appellant : D'Souza

Respondent : Joseph

Advocate for Def. : Sreekantegowda, Adv. for ;S.R. Bannnurmam and ;Jagdish Mundargi

Advocate for Pet/Ap. : K. Prabhakar, Adv.

Disposition : Appeal dismissed

Judgement :

N.D.V. Bhat, J

1. This Appeal is preferred against the judgment and decree dated 16-8-1984 passed by the VIII Additional City Civil Judge, Bangalore City, in O.S.No. 2243/1980. By the said judgment, the learned Additional City Civil Judge decreed

the suit of the plaintiff for permanent injunction restraining the defendant from interfering with plaintiff's peaceful possession of the suit schedule property. Being aggrieved by the said judgment, defendant J.D'Souza has preferred this Appeal.

2. It appears, plaintiff-respondent A. Joesph died on 3-4-1991. I may point out here that Sri K.N. Bhat appearing for Sri Sreekantegowda in the companion matter submitted that there is no dispute about the death of A. Joseph. The Advocate for the appellant, in the light of the aforesaid development, has filed a Memo as under:

'The appellant submits as under:

1. The respondent herein as the plaintiff had filed O.S.No: 2888/87 against the appellant herein, for a judgment and Decree as under:

'Wherefore the plaintiff prays for a Judgment and Decree against the Defendant for Permanent injunction restraining the Defendant from interfering with the peaceful possession of the plaint suit schedule property.'

2. The appellant respectfully submits that the sole respondent hereon died on 3-4-1991 and further submits that since the relief was only permanent injunction which is purely of a permanent character has got extinguished along with the death of the sole respondent.

3. It is respectfully submitted that as a consequence of the death of the respondent herein, the Appeal proceedings will have to be closed with the observation that the decree ceases to be in operation by virtue of law.

WHEREFORE, the Appellant respectfully prays that the Hon'ble Court be pleased to dispose of the Appeal as the Decree under Appeal does not survive for any further considerations, in the best interest of equity, justice and law.'

3. I have heard Sri Prabhakar, learned Counsel for the appellant. Sri Sreekantegowda, learned Counsel, though could not represent the deceased respondent, was heard by the Court on the point of law since he has appeared for the deceased respondent in another appeal namely RFA 134/89. The point for

consideration is as to whether the appeal abates or the suit itself abates, on account of the death of the respondent in this case. As pointed out hereinabove, there is no dispute as regards the date of death of the respondent. Sri Prabhakar, appellant's Counsel submitted that the decree in question is an injunction decree obtained by the deceased plaintiff-respondent against the defendant-appellant and that, on the death of the deceased plaintiff, the decree would wither away. In other words, what is submitted by Sri Prabhakar is that a decree for injunction does not run with the land and that it is personal to the person who has obtained the decree and that therefore, on the death of the decree holder, the decree would also die and that the question of the legal representative of the deceased executing the decree under Order 21 Rule 32 does not arise at all. It is pointed out by Sri Prabhakar that, under these circumstances, the order in terms of the Memo filed by him for the appellant deserves to be passed. Sri Prabhakar, appellant's Counsel has invited the attention of this Court to the Decision in BASAVANT DUNDAPPA v. SHIDALINGAPPA SIDA-RADDI; the Decision in GIRIJANANDINI DEVI AND ORS. v. BIJENDRA NARAIN CHOUDHARY; the Decision in CHANDRUP SINGH AND ANR. v. DATA RAM AND ORS. and the Decision in CHERANELLUR CO-OPERATIVE SOCIETY LTD v. DEPUTY REGISTRAR. Learned Counsel also invited the attention of this Court to certain passages reflected in Pages 572 and 573 in NELSON'S LAW OF INJUNCTION.

4. I have given my anxious consideration to the submission made by the appellant's Counsel in the context of the Decisions pressed into service by him. It will have to be seen as to whether the submission made by the learned Counsel in the context of the Decisions pressed into service by him is acceptable. In the Decision of the Supreme Court which is pressed into service Girijanandini Devi and Ors. v. Bijendra Narain Choudary, the relevant para on which reliance is placed reads as under:

'Para 14:

Finally it was urged that since defendants Mode Narain and Rajballay Narain had died during the pendency of the proceedings, the High Court was incompetent to pass a decree for account against their estates. Rajballav who was defendant No.

6 died during the pendency of the suit in the Trial Court and Mode Narain who was defendant No. 1 in the suit died during the pendency of the appeal in the High Court. But a claim for rendition of account is not a personal claim. It is not extinguished because the party who claims an account, the party who is called upon to account dies. The maxim '*action personalis moritur cum persona*' the personal action dies with the person, has a limited application. It operates in a limited class of actions *ex delicto*

1. : ILR 1986 KAR1959

2. : [1967]1SCR93

3.

4. : AIR1977 Ker76

such as actions for damages, assault or other personal injuries not causing the death of the party, and not other actions where after the death of the party the relief granted could not be enjoyed or granting it would be nugatory. The action for account is not an action for damages *ex delicto*, and does not fall within the enumerated classes. Nor is it such that the relief claimed being personal could not be enjoyed after death, or granting it would be nugatory. Death of the person liable to render the account for property received by him does not therefore affect the liability of his estate. It may be noticed that this question was not raised in the trial Court and in the High Court. It was merely contended that because the plaintiff Bijendra Narain was receiving income of the lands of his share no decree for account could be made. The High Court rejected the contention that no account would be directed in favour of the plaintiff on that account. They pointed out that the mere fact that the plaintiff was in possession of some portion of properties of the joint family since 1941 cannot possibly absolve the defendants who were in charge of their dealing with the management of the properties from rendering accounts of the joint family estate. The plaintiff was since September 1941 severed from the joint family in estate and also in mess and residence, and he was entitled to claim the account from the defendants from September 1941, but not for past dealings. The fact that the plaintiff is in possession of some of the properties

will, of course, have to be taken into account in finally adjusting the account.'

The observations made by the Supreme Court are self-explanatory and it is not necessary to dilate with reference to the same. A careful perusal of the observation would clearly go to show that the same is not of any assistance whatsoever to the appellant. If I may say so, the observations referred to hereinabove would run counter to the submission made by the learned Counsel. It is therefore clear that, the said Decision is not of any assistance to the Appellant's counsel. If that be so, it will have to be seen as to whether the Decision of this Court in Basavant Dundappa's Case alluded to hereinabove is of any assistance to the learned Counsel for he appellant. This Court in the said case has, among other things, observed at paras 5 and 6 therein as under:

'5. In Mulla's Code of Civil Procedure, Fourteenth Edition, Vol.1, at page 359 it has been stated as:

'12. Decree for injunction:- An injunction obtained against a defendant restraining him from obstructing plaintiff's ancient rights may on the death of the defendant, be enforced under this Section against his son as his legal representative by the procedure under Order 21 Rule 32 (Code of 1882, Section 260). Similarly, a decree for an injunction against a manager and representative of a joint Hindu family can be enforced after his death against a son who represents the joint family. But such an injunction cannot be enforced under this Section against a purchaser of the property from the defendant, for an injunction does not run with the land. The remedy of the decree-holder is to bring a fresh suit for an injunction against the purchaser.'

6. Similarly, in AIR Commentaries on the Code of Civil Procedure, 9th edition, Vol. I, page 859 it has been stated as:

'18. Decree for injunction:- As has been seen in Note 21 to Section 47, an injunction does not run with the land and cannot be enforced under the Section against a purchaser of the property from the defendant or against a person who is not his legal representative,'

The observation made by this Court would clearly go to show that a decree for injunction cannot be enforced against the auction purchaser from the judgment debtor. The reason that is given is that injunction does not run with the land and that therefore, the decree passed against the person cannot be enforced against the purchaser from the judgment debtor, Such is not the situation here. I may point out here that the observation made by Mulla, the extract of which is reproduced in the Decision in Basavant Dundappa's case would go against the appellants Counsel. As can be seen from the observation reflected in para 5 in the said case, an injunction obtained against defendant restraining him from obstructing the plaintiff's ancient rights may on the death of the defendant, be enforced upon under his Section against his son as his legal representative by a procedure under Order 21 Rule 32, CPC. It is also pointed out that a decree for injunction against a manager representing the joint family can be enforced against his son after the death of the manager. Further, it is pointed out that the decree cannot be enforced against the purchaser of the property from the defendant, since injunction does not run with the land. The rationale reflected in the said observation is very clear. Whenever and wherever there is a transfer of the property, the injunction granted against the transferor will not be available against the transferee obviously on account of the fact that the injunction does not run with the land. That is the ratio laid down by this Court in the context of the observation made by Mulla in the Civil Procedure Code which is extracted hereinabove. I hasten to add here that the question as to whether a decree for injunction can be enforced against his son decided in the said case is with reference to the question as to what should happen to a decree for injunction after the death of the person against whom the decree for injunction is obtained. In the instant case, the matter is slightly different. The question for consideration is as to what should happen to the decree obtained by the plaintiff after plaintiff's death. However, one thing is very clear that, if a decree for injunction against a person can be enforced even against his son, it is obvious that a similar logic should hold good even in the case of the death of the plaintiff who has obtained a decree. It is no doubt true that an injunction does not run with the land. However in a case of heirship, the question of transfer of property does not arise. The question of injunction running with the land would not arise in a case where the heirs of the deceased steps into the shoes of the person

who has obtained the decree. In my opinion, the observation made in Mulla's Civil Procedure Code which is extracted at para 5 in the Judgment of this Court in Basavant Dundappa's case to the effect that a decree for injunction can be enforced against the son of the defendant, should equally hold good in the case of the death of the plaintiff decree holder. In other words, in my view, there should not be any legal impediment for a heir of a decree holder to enforce the decree for injunction against the judgment debtor. As pointed out earlier, the observation made in Mulla's Civil Procedure Code on the basis of which the Judgment has been delivered by this Court in Basavant Dundappa's case, *mutatis mutandis* holds good here also and in that context, I am of the view that there should not be any difficulty for the legal heirs of the deceased plaintiff to enforce the decree for injunction against the judgment debtor.

5. Under these circumstances, I have no hesitation whatsoever in holding that the Decision of this Court in Basavant Dundappa's case pressed into service by the Counsel for the appellant is not at all of any assistance to the appellant.

6. If that be so, it will have to be seen as to whether the next Decision relied on by the appellant's Counsel namely, the Decision in Chandrasingh's case is of any assistance to the appellant to contend that the suit itself abates in the appeal in question. In the said case, a Full Bench of the Punjab High Court has taken the view that right of pre-emption under Section 19(3) of the Punjab Pre-emption Act (1/1913) rests wholly on blood relationship alone and that therefore, after the death of the person who is entitled to pre-emption, the same does not enure to the advantage of his heirs. It is needless to say that the ratio laid down in the said Decision with reference to the provisions of the Punjab Pre-emption Act is not at all applicable to the facts of the case. If the conferment of the right is regulated by a statutory enactment, the same will have to be regulated in accordance with the provisions of the said Act and not *dehors* the provisions of the said Act. The Punjab High Court has laid down the principle in the way 'and manner as stated hereinabove obviously on account of the indication as regards as to how that right will have to be regulated in the Punjab Pre-emption Act itself. Under these circumstances, any observation made in the context of the said provision cannot be generalised and pressed into service in the context of the situation like the one

in hand. It is not necessary for this Court to dilate further with reference to the said Decision. It will suffice if it is observed, even at the risk of repetition that the said Decision is not of any assistance to the appellant.

7. If that be so, it will have to be next seen as to whether the Decision in Cheranellur Co-operative Society Ltd's Case is of any assistance. On a perusal of the said Decision, I do not find anything in the said Decision worthwhile mentioning, which can be picked up by the appellant in support of his contention that the heir of a decree holder of a decree for injunction cannot enforce the decree for injunction. It will suffice if it is observed that the said Decision is not at all applicable to the facts of the case. Similarly, I am of the view that the observations made in NELSON'S LAW OF INJUNCTION also are not of any assistance to the appellant.

8. For the reasons stated hereinabove, I am of the view that there is no substance in the contentions raised by the appellant that the appeal would not abate but the suit would abate. I have no hesitation whatsoever in holding that, having regard to the fact that the legal heirs of deceased plaintiff-respondent are not brought on record, it is the appeal which would abate and the question of passing any order in the way and manner as is suggested in the Memo for disposal which is extracted earlier, does not arise.

9. For the reasons stated hereinabove, the Memo filed on behalf of the appellant is disposed of by dismissing the Appeal holding that the Appeal has abated.