

Churya and ors. Vs. Baneshwar

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Court : Allahabad

Decided On : Jan-20-1926

Reported in : AIR1926All217

Appellant : Churya and ors.

Respondent : Baneshwar

Judgement :

Sulaiman, J.

1. In a Letters Patent appeal which was disposed of last year two applications have been filed on behalf of the appellants, one praying that the appeal may be declared to have abated as against Baneshwar, deceased respondent, and the other praying that the appeal be restored to its original number and the names of his two sons be brought on the record in the array of the respondents.

2. The suit was brought for ejectment by the plaintiffs against three defendants. Baneshwar was Defendant No. 3 and was not related to the other defendants. The plaintiffs' case was that they were occupancy tenants of the plots: that Defendants Nos. 1 and 2 were their sub-tenants and that Defendant No. 3 was the subtenant of the Defendants sub-tenants. The Court of first instance dismissed the suit, but on appeal the District Judge decreed the claim on the 23rd of December 1921. A second appeal to the High Court was preferred by Baneshwar. Defendant No. 3 and a learned Judge of this Court allowed the appeal and ordered that the

memorandum of appeal presented in the Court of the District Judge should be returned to the respondent for presentation to the proper Court. A Letters Patent appeal was filed by the plaintiffs against this order.

3. It is now an admitted fact that Baneshwar, defendant died on the 28th of February 1924 while the appeal was pending, but this fact was not brought to the notice of the Bench hearing the Letters Patent appeal which allowed the appeal and restored the decree of the District. Judge.

4. When the plaintiffs proceeded to execute their decree against the defendants including Baneahwar, an objection was filed by the heirs of Baneshwar on the 5th January 1925, to the effect that Baneshwar having died before the decision of the Letters Patent appeal the decree was not binding on them. The plaintiffs accordingly filed the aforementioned applications in this Court on the 23rd of April 1925. Their allegation is that they became aware of the death of Baneshwar only when objections were filed on the 5th January 1925 and they made further enquiries in the village. On the other hand the allegation on behalf of the opposite party is that the applicants were fully aware of the death of Baneshwar even long before the 5th of January 1925.

5. A preliminary objection to the hearing of these applications is taken that they are barred by time. It is urged that the abatement of the appeal took place on the expiry of 90 days from 28th of February 1924 when Baneshwar died, and that no application for setting aside the abatement having been made within 60 days of the said expiry the present applications are barred by time. On the other hand, the learned vakil for the applicants relies on the case of *Gujrati v. Sital Misir* AIR 1922 All 209 and urges that it was necessary to pass an order of abatement before the appeal could abate and that inasmuch as no order of abatement has yet been passed time under Article 171 of the Limitation Act has not yet begun to run against them.

6. In the case of *Lachmi Narain v. Muhammad Yusuf* (1920) 42 All 540 Walsh, J., held; 'Whether or not a formal order to that effect is passed a suit or appeal abates automatically when no application is made within time to bring upon the record the representative of a deceased plaintiff or appellant.' In a subsequent case the

correctness of this decision was doubted by Benerji, J., who referred a similar application for decision to a Bench of two Judges. The decision of the Bench is to be found in *Gujrati v. Sital Misir* AIR 1922 All 209. The view taken by the Bench (Ryves and Gokul Prasad, JJ.) was that the point was concluded by a former decision of this Court in the *Secretary of State v. Jawahir Lal* AIR 1914 All 94, which decision in their opinion was correct. The learned Judges then went on to observe that having regard to the language of Order 22, Rule 9(2) it was quite obvious that a suit could not be dismissed automatically and that it seemed to them therefore 'that a formal order declaring that a suit or an appeal has abated is necessary before an application under this rule can be entertained.'

7. In my opinion the authority referred to by the learned Judges does not really support the contention of the applicants. I do not take that judgment to lay down that a formal 'order declaring that an appeal has abated is always necessary before an abatement can take place. On the other hand in the course of the judgment, the learned Chief Justice and Benerji, J., who decided the case of the *Secretary of State v. Jawahir Lal* AIR 1914 All 94 remarked: 'As no application was made in this case to bring on the record the legal representative of the deceased respondent within the six months prescribed by the Limitation Act this appeal has abated.' They then went on to say 'We accordingly declare that the appeal has abated.'

8. Under Order 22, Rule 4(3) it is provided that where within the time limited by law no application is made under Sub-rule (1) the suit shall abate as against the deceased defendant. The rule does not say that the Court shall pass an order directing that the suit abates. In the same way under Rule 9(2) it is provided that the plaintiff or the person claiming to be the legal representative of a deceased plaintiff, or the assignee or the receiver in the case of an insolvent plaintiff, may apply for an order to set aside the abatement or dismissal. It does not say to get aside 'the order for abatement or dismissal' as Section 371 of the old Code of Civil Procedure had said. The learned Judges in the case of *Gujrati v. Sital Misir* AIR 1922 All 209, apparently quoted the repealed section when they remarked that was an application to set aside an order of abatement in an appeal pending in that Court. Further the argument that a suit cannot be dismissed automatically does

not apply to an automatic abatement of a suit. The Legislature has not only amended the Code of Civil Procedure but has also similarly amended Article 171 of the new Limitation Act. Now, the application is to set aside an abatement, and 60 days begin to run from the date of the abatement, and not from the order of abatement.

9. We, therefore, entertain doubts as to the correctness of the decision in 44 All. 459. As, however, the point was expressly referred to a Bench by a learned Judge of this Court and was decided after a consideration of the provisions of the Code and was intended to be an authoritative pronouncement, we cannot openly dissent from the view of the Division Bench, and think that the point should be decided by a larger Bench, as it is of considerable importance and arises frequently.

Mukerji, J.

10. I entirely agree with my learned brother and wish to add just one word in support of his arguments which seem to be entirely unassailable. I can see no utility of Sub-rule AIR 1914 All 94 of Rule 9 if the law, that was intended to be enacted, meant that an application to set aside an abatement should be made only after an order for abatement, had been made. When a party whose interest it is to set aside an abatement comes before the Court, he would come naturally with two prayers. One prayer would be that an order may be passed declaring an abatement, and the other would be to set aside the abatement. An application for setting aside an abatement must be made within two months from the abatement. There would be no necessity for two months' time when, as a matter of course, the applicant would make the application before an order of abatement has been made. A fortiori there would be no necessity for granting further time under Section 5 of the Indian Limitation Act for making an application for setting aside an abatement.

11. We accordingly direct that the papers be laid before the Honourable Chief Justice for consideration whether the matter should or should not be referred to Pull Bench.

12. When the case came up before the Full Bench the following judgments were delivered;

Lindsay, J.

13. This case has been referred to a Pull Bench in order to obtain a pronouncement as to whether the case reported in *Gujrati v. Sital Misir* AIR 1922 All 209 was rightly decided. This question is connected with the question of the proper interpretation of certain expressions to be found in Order 22 of the Code of Civil Procedure. That order deals with what is to happen to suits in cases of the death, marriage and insolvency of parties, and in general terms the order declares that on the happening of certain events the suit abates, This procedure is also made applicable to appeals by virtue of Rule 11, Order 22, so that under the order in question it is possible for either a suit or an appeal to abate. When a suit or appeal abates under the order, Rule 9 lays down a procedure by way of revival, and if that procedure is followed the suit or appeal which has abated and so to speak, become dead is revived.

14. The question upon which there has been a considerable difference of judicial opinion in this Court is whether before a suit abates it is necessary for the Court to pass what has been called an order for abatement, that is to say, the question is whether a suit abates automatically or whether in order to bring about abatement it is necessary that the Court should pass an order to that effect.

15. It seems to me on a study of the language of Order 22 that it is impossible to contend that there is any need for a Court to pass what is called an order for abatement; for in my opinion abatement is an automatic proceeding and results from the happening of certain events which are mentioned in Order 22. That was the view which was taken also by Mr. Justice Walsh in the case reported in *Lachmi Narain v. Muhammad Yusuf* (1920) 42 All 540. It seems however, that this judgment was overruled by the Bench decision which we are now considering namely the decision in 44 All. 459. There two learned Judges of this Court said as follows at page 461 of the report:

It seems, to us that the point is concluded by the decision in Secretary of State v. Jawahir Lal AIR 1914 All 94 and we think that decision was correct. In Order 22, Rule 9(2) it is stated that the plaintiff may apply for an order to set aside the abatement or dismissal. It is quite obvious that a suit cannot be dismissed automatically. It seems to us, therefore that a formal order declaring that a suit or appeal has abated is necessary before an application under this rule can be entertained.' All I can say is that with great respect I am unable to follow the opinion of the two learned Judges. It is certainly true that there can be no automatic dismissal of a suit under Order 22. The only provision for dismissal of a suit under this order is to be found in Rule 8(2). The case which is there contemplated is one in which the plaintiff has become insolvent and under Rule 8(2) the defendant may apply to the Court for the dismissal of the suit on the ground of the plaintiff's insolvency. On that application being made the Court may make an order dismissing the suit. Quite clearly there can be no automatic dismissal for, as has just been pointed out, this dismissal must result from an application made by the defendant. But it does not follow that because a suit may not be dismissed automatically the suit does not abate automatically. On the contrary, it seems clear in every way that abatement in the case of a suit or appeal is an automatic proceeding and that for the purpose of producing what is described as the condition of abatement no order of the Court is necessary. It does indeed happen in practice that Courts do declare that a suit or appeal has abated, but in making this declaration they are merely recording a fact which has happened in the law and the abatement does not result in any way from the making of the order. The order is merely a declaration of an existing fact.

16. With regard to the case reported in Secretary of State v. Jawahir Lal AIR 1914 All 94, which is cited as an authority by the learned Judges who decided the case recorded in 44 All., referred to above, I am of opinion that this decision does not lay down that it is necessary that the Court should pass a formal order to bring about the abatement of a suit or appeal. It is quite true that certain expressions in the judgment in that case as also in the referring order might lead one to suppose that the making of a formal order was necessary. For example, in the referring order of Piggott, J., we find the following:

An order for the abatement of the appeal would certainly follow automatically upon an order rejecting the present application.

17. Again, in disposing of the case, the two learned Judges who decided the reference say that: 'He may,' after the order of abatement has been passed, apply to have it set aside on the ground that he was prevented by any sufficient cause from continuing the suit.' These expressions, as I say, might indicate that the passing of an order for abatement was legally necessary. On the other hand, it would appear from another passage in the judgement that the learned Judges were not of the opinion that such an order was required, for they say at page 238 of the report as follows,

Therefore as the law now stands since no application was made under Sub-rule 1 within the time allowed by law the appeal must abate.

18. However that may be, it seems to me perfectly clear that the abatement of a suit or appeal is an automatic process and that in order to work an abatement in either case no order of the Court is required.

19. Some of the confusion which has attended the discussion of this question has probably arisen from the fact that under the Civil P. C, Act XIV of 1882, there were certain sections which declared that an order for abatement of a suit might be passed by the Court. I may refer in this connection to Section 366 of Act XIV of 1882. Section 371 also provided certain procedure by which an order for abatement could be set aside. It is also pertinent to notice in this connexion that under the Limitation Act of 1877, Article 171 provided a period of sixty days for applications made under Section 371 of the Code of Civil Procedure for an order 'to set aside an order for abatement' and the period of sixty days was declared to begin to run from the date of the order for abatement or dismissal. This period of limitation was obviously so framed because of the language of Section 371 which, as I have already said, provided for the setting aside of an order for abatement.

20. If we turn now to Act IX of 1903 which was passed in the same year as the present Civil P. C, we find that Article 171 is couched in different language. The article provides a period of sixty days for an application under the Code of Civil

Procedure, 1908, for an order to set aside an abatement (not to set aside an order for abatement) and the period of sixty days begins to run not from the date of any order of abatement but from the date of abatement.

21. I am satisfied therefore that the decision in 44 All 459 is not a correct decision and ought to be overruled. In my opinion the correct law was laid down in the judgment above referred to which is reported in 42 All. 540. The true interpretation of O. 22 is that, in order to work the abatement of a suit or appeal, it is not necessary for the Court to pass any order.

Sulaiman, J.

22. I fully agree. My view with reasons is fully set forth in the order of reference which I adopt. I may only add that according to the English practice (Order 17, Rule 9) where any cause or matter 'becomes abated,' the solicitor for the plaintiff or person having the conduct of the cause or matter merely certifies the fact to the proper officer who causes an entry thereof to be made in the Cause Book opposite to the name of such cause or matter.

Mukherji, J.

23. I entirely agree. As additional reason I would refer to my referring order in which I referred to the provision contained in Sub-rule 3 of Rule 22, Rule 9.

24. The case can now be sent back again to the learned Judges who referred the above matter to this Bench for opinion.

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