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Court : Allahabad

Decided On : Feb-27-1974

Reported in : AIR1974All422

Judge : Hari Sarup and ;Gopi Nath, JJ.

Acts : Code of Civil Procedure (CPC) - Order 1, Rule 10(2) - Order 22, Rule 4

Appeal No. : Civil Misc. Writ No. 1006 of 1974

Appellant : Khalil Ahmad and ors.

Respondent : Additional District Judge, Gorakhpur and ors.

Advocate for Def. : Standing Counsel

Advocate for Pet/Ap. : V.B. Khare, Adv.

Disposition : Petition dismissed

Judgement :

1. This petition has been filed against the order of the trial court impleading respondents Nos. 10 and 11 as defendants in the suit and the order passed in revision filed by the petitioners against that order. The parties were impleaded by the trial court under Order 1, Rule 10 (2) of the Code of Civil Procedure and the revisional Court held that the trial court had committed no error of jurisdiction in directing the impleadment.

2. The suit was one for redemption of mortgage. One of the mortgagees had died during the pendency of the suit and his heirs had not been impleaded by the plaintiff who was seeking redemption. The heirs of the mortgagee were admittedly necessary parties in the suit for decision of the controversy. An application had been moved by the plaintiff beyond time for impleading the heirs under Order 22, Rule 4, C.P.C. but that application was dismissed as time barred.

3. Learned counsel for the petitioner contends that once the application under Order 22, Rule 4 is dismissed, the bar of Order 22, Rule 9 comes in the way even in the impleadment of parties by the court under Order 1, Rule 10 (2) C.P.C. We are unable to accept this contention. Order 22, Rule 4 gives a party a right to get legal representative brought on record. Rule 9 of Order 22 bars the institution of a fresh suit on the same cause of action. The effect of Rules 4 and 9 of Order 32 is to abate the suit against the deceased and to take away the plaintiff's right to institute a fresh suit against his legal representatives. This, however, does not mean that the suit cannot continue with the parties as they remain and are subsequently added under some other provision of law. Order 22, Rule 9, C.P.C. affects the rights of a party, but does not take away the right of the court to bring on record any person whom the court considers necessary for effectually adjudicating upon and settling of the questions involved in the suit. Sub-rule (2) of Rule 10 of Order 1 of the Code of Civil Procedure deals with special cases where the impleadment of a party is necessary in order to enable the court to effectually adjudicate the questions involved in the suit. If the necessary conditions exist, the court has the power to direct the impleadment of any person. The inaction on the part of a plaintiff to implead or bring on record a person as defendant cannot affect the right of the court to implead him as a party in the suit in exercise of its jurisdiction under Order 1, Rule 10 (2). C.P.C.

4. In support of his contention to the contrary learned counsel relied upon a decision of this Court in *Tularam v. Mangaloo* : AIR1954 All10 . In the case the trial court after dismissing the application for bringing on record the legal representative also rejected the prayer for impleading the person as party under Order 41, Rule 20, C.P.C. Learned counsel has also relied on the decision in *Md. Faruq v. Azizul Hasan* (AIR 1935 Oudh 329). In that case the legal representatives

were sought to be brought on record in appeal and it was not allowed. Both these cases deal with the provisions of Order 41, Rule 20 which provides for an entirely different situation. Rule 20 of Order 41 runs as follows:

'Where it appears to the court at the hearing that any person who was a party to the suit in the Court from whose decree the appeal is preferred, but who has not been made a party to the appeal, is interested in the result of the appeal, the court may adjourn the hearing to a future day to be fixed by the Court and direct that such person be made a respondent.'

Rule 20 contemplates a situation where the person is already a party. It gives the court the power to treat such a person as party even though the appellant has not impleaded him. It has nothing to do with the case of legal representatives who originally were not and could not have been, parties to the suit. These cases have no applicability to the circumstances of the present case.

5. Learned counsel also contended that Order 1, Rule 10 (2), C.P.C. can apply only for impleading a person who could or should have been impleaded as party on the date of the institution of the suit. The contention is that as these persons were not necessary parties on the date of the suit, Rule 16 (2) will not apply. Here also we are unable to agree with the learned counsel. If Rule 10 (2) gives power to the court to implead a person whom the plaintiff did not implead initially, we see no reason why the Court should not be able to implead a person who subsequently becomes a necessary party and whom the plaintiff omits to implead. The stage at which the necessity is to be considered cannot be the stage only of the date of the institution of the suit, but any date upto the date of the final adjudication. If during the pendency of the suit at any stage the court finds that the person who is a necessary party is not before it, it can direct that he be impleaded as a party and should be before the court. The court thus committed no error of law in directing the impleadment of these persons as parties.

6. The order of the trial court can also not be challenged on the ground of an error of jurisdiction, because as held by the Supreme Court in 'Razia Begum v. Anwar Begum' : [1959]1SCR1111 :

'The question of addition of parties under Rule 10 of Order 1 of the Code of Civil Procedure is generally not one of initial jurisdiction of the Court, but of a judicial discretion which has to be exercised in view of all the facts and circumstances of a particular case.....'

The order of the trial court cannot therefore, be said to suffer from either an error of jurisdiction or a manifest error of law. The revisional order for the same reasons cannot be held to be void.

7. Petition accordingly fails and is dismissed.

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