

Nathmal Vs. Mahesh Kumar and ors.

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Court : Rajasthan

Decided On : Nov-28-1980

Reported in : AIR1981Raj89

Judge : N.M. Kasliwal, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 151

Appeal No. : Civil Misc. Petn. No. 90 of 1980

Appellant : Nathmal

Respondent : Mahesh Kumar and ors.

Advocate for Def. : P.N. Datt and; V.S. Dave, Advs.

Advocate for Pet/Ap. : J.S. Rastogi, Adv.

Disposition : Petition dismissed

Judgement :

ORDER

N.M. Kasliwal, J.

1. Brief facts leading to this petition are that Mahesh Kumar, RameshKumar, Rajesh Kumar and Umesh Kumar, sons of Keshav Deo filed a suit on March 26, 1962, for declaration that the mortgage by conditional sale made by Keshav Deo

on 8th November, 1946, does not affect the plaintiff's interest in the properties mentioned in Schedule 'A' and the decree for partition obtained by the defendants Onkar Mal, Banwari Lal and Bhoora Mal on March 29, 1961, does not affect the plaintiffs' right, title, and interest in the said properties. The suit was decreed in favour of the plaintiffs by the learned District Judge, Jhunjhunu by his judgment dated March 31, 1967. Aggrieved against the aforesaid judgment and decree Shri Onkar Mal and Banwari Lal defendants filed an appeal in this Court in, which the above named plaintiffs were impleaded as respondents and Shri Bhoora Mal one of the defendants was also impleaded as respondent No. 5. This court vide its judgment dated 20th February, 1980, allowed the appeal, set aside the judgment and decree passed by the learned District Judge dated 31st March, 1967 and dismissed the suit of the plaintiffs with costs. The plaintiff-respondents Nos. 1 to 4 above named filed a petition under Section 151, Civil P. C. on March 12, 1980, alleging therein that the appellant Banwari Lal died about 3 years prior to the judgment by this Court on February 20, 1980. The deceased Banwari Lal had left two sons and his wife as legal representatives. The appellant? did not take steps to substitute the legal representatives of Banwari Lal with the result, that the appeal automatically abated after the expiry of statutory period of 90 days. It is further alleged that Onkar Mal and Kalu Ram father of Banwari Lal were real brothers and both Onkar Mal and Banwari Lal were residing at Berakad District Vardhman in the State of West Bengal. Onkar Mal had knowledge about the death of Banwari Lal but still he did not take any step for substituting his legal heirs on record within time. The decree has been passed by this Hon'ble Court, in favour of a dead person namely Banwari Lal and the same as such be declared as a nullity. It is also alleged that the learned trial Court had passed a joint decree against Onkar Mal. Banwari Lal and Bhoora Mal to the effect that the properties mentioned in the Schedule at item numbers 1 to 9 were ancestral properties of the plaintiffs and Keshav Deo had no right to alienate that property.

The learned trial Court had further held that the transfer-deed dated 8th November, 1946 was null and void and ineffective against the plaintiffs. The learned trial Court further held that the plaintiffs were not bound by the decree passed on 29th March, 1961, and the defendants Nos. 1 to 3 were restrained with a permanent injunction from taking possession on the properties or any part

thereof mentioned in Schedule 'A'. After abatement of the appeal against Banwari Lal, the result of the decree passed by this Hon'ble Court on 20th February, 1980, will be passing two conflicting decrees. The death of Banwari Lal was not in the knowledge of the respondents otherwise they would have informed their counsel earlier. They came to know about this fact after due diligence and when they came to know about the result of the appeal and then Ramesh Kumar went to his home town, he was informed about the death of Banwari Lal and in these circumstances have prayed to set aside the judgment and decree passed by this Court on February 20, 1980.

2. In the reply to the application filed by Onkar Mal defendant-appellant No. 1, the fact that Banwari Lal had died about three years back is not denied. In the reply filed on April 28, 1980, it was mentioned that Shri Bhoora Mal defendant No. 2 in the suit was made a pro forma respondent No. 5 in the appeal before the High Court. It was also not denied that Banwari Lal had left behind his wife, since deceased, and two sons and no application was submitted to bring them on record, but it was not necessary to do so. It is denied that the appeal automatically abated on the expiry of 90 days after Banwari Lal's death. In Clause (b) of para 7 of the reply a family pedigree has been given according to which it is alleged that Shri Gopal Rai and his three sons Harsukhrai Kaloo Ram and Onkar Mal and Bhoora Mal sons of Harsukhrai and Banwari Lal son of Kaloo Ram, all formed a joint Hindu family of which Shri Gopal Rai was the Karta. After the death of Gopal Rai Harsukhrai and after the death of Harsukhrai, Shri Kalu Ram and after the death of Kalu Ram Shri Onkar Mal appellant No. 1 became the Karta. The agreement dated 5th January 1946, between Keshav Deo Tulsian father of the plaintiff and Kalu Ram, Onkar Mal and Bhoora Mal were also entered into with Shri Kaloo Ram as Karta and Shri Kaloo Ram has signed on it as Karta on behalf of himself and Onkar Mal and Bhoora Mal. Shri Kaloo Ram as Karta had paid Rs. 80,000/- to Shri Keshav Deo as part of the purchase money at the time of the said agreement. As Onkar Mal appellant was already on record and even Bhoora Ma) (his nephew) was also there as a pro forma respondent it was neither necessary nor it was considered necessary to bring on record the legal representatives of Banwari Lal appellant No. 2 as Onkar Mal alone was competent to continue the appeal. It is further alleged that the decree passed by this Hon'ble Court is in

favour of Onkar Mal appellant No. 1, who is the Karta of the family and faithfully represents the entire family including the heirs of Banwari Lal. The decree is not a nullity as the petitioners have no right to challenge it. If any person can do so it is only the legal representatives of Banwari Lal, but they are fully satisfied with it and accepted it. It is further alleged that the legal representatives of Banwari Lal i.e. Ratan Lal Agrawal and Rajendra Prasad Agrawal do not challenge the decree in favour of Banwari Lal and instead accept it and in token of it they are submitting their vakalatnama in favour of Shri P. N. Datt and Shri K.N. Tikku along with this reply.

3. The plaintiff-respondents Nos. 1 to 4 then filed a rejoinder on July 7, 1980, that it was not the case of appellant Onkar Mal at any stage that Onkar Mal and Banwari Lal were members of joint Hindu family or the property in suit was purchased by them as members of joint Hindu family. On the contrary in the sale deed dated Nov. 8, 1946, it was stated that property in suit was purchased by Onkar Mal, Bhoora Mal and Kalu Ram father of Banwari Lal. Onkar Mal, Bhoora Mal and Banwari Lal filed a suit in the court of District Judge in 1964 and in that suit also it was not their case that they were members of Joint Hindu family or the property in question was joint Hindu property. The appellants were claiming the property as co-owners and now a new case of alleged joint Hindu family was being made out which was an afterthought and cannot be enquired into at this stage. It is further alleged that after coming into force of Hindu Succession Act if a male Hindu died intestate his property devolved on his legal representatives not as joint tenants but as tenants in common. Thus, after the death of Banwari Lal there was no representation of the interest of Banwari Lal and the decree passed against him became final and it cannot be set aside by this Hon'ble Court. It is further alleged that Onkar Mal and Banwari Lal were living separately and doing their business separately. Onkar Mal was the owner of coal mines in the name of Bon-Jemihari and Bhoora Mal respondent was the owner of coal mines Lohat Colliery and Pandabeshwar in Barkar District Vardhman. These mines have been nationalised and the compensation had been claimed by the said owners, The appellant Onkar Mal had submitted income-tax returns as individual owner of business etc. and not as member of joint Hindu family. In support of the above allegations certain documents have also been annexed along with the rejoinder.

4. The defendant-petitioner (sic) Onkar Mal then submitted a further reply to the rejoinder on July 14, 1980, again reiterating the stand that Onkar Mal and Banwari Lal were members of joint Hindu family. The plaintiff-respondents Nos. 1 to 4 then further submitted a reply on September 15, 1980 in which they have supported their stand that the appellants Onkar Mal and Banwari Lal were not members of joint Hindu family.

5. Mr. J.S. Rastogi appearing on behalf of the plaintiff-respondents has vehemently contended that the decree passed by the trial Court in their favour against the defendants Onkar Mal and Banwari Lal and Bhoora Mal was a joint decree and Banwari Lal, who was one of the appellants having admittedly died three years back and his legal representatives having not been brought on record within 90 days, the whole appeal abates. Onkar Mal and Banwari Lal were the real uncle and nephew and were residing in the same town and it is not disputed that Onkar Mal had knowledge of the death of Banwari Lal and in these circumstances the whole appeal had automatically abated after the expiry of 90 days of the death of Banwari Lal and the judgment and decree passed by this Court on February 28, 1980 was a nullity. It is also contended that the decree passed by the trial Court having become final as against Banwari Lal and his legal representatives, if this Hon'ble Court now sets aside the decree of the trial Court as regards Onkar Mal and Bhoora Mal then it would be passing two inconsistent decrees, Mr. Rastogi placed reliance on a catena of decisions in support of his above contentions,

6. Mr. Datta, on the other hand, submitted that the plaintiff-respondents were given full opportunity of hearing and at least they cannot raise this grievance. That the legal representatives of Banwari Lal though have not been impleaded in place of deceased Banwari Lal, but have already appeared in this court through counsel and have no grievance in the judgment passed by this Hon'ble Court on February 20, 1980. An application has also been filed by them under Order 1, Rule 10, C. P. C. for being impleaded as parties. It is further contended that under Order 41, Rule 4, C. P. C. where there are more plaintiffs or more defendants than one in a suit and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the appellate Court may reverse or vary the

decree in favour of all the plaintiffs or defendants, as the case may be. It is thus submitted that under the above provision Onkar Mal alone could have filed the appeal and as the decree appealed from proceeded on a ground common to all the defendants and, even if Banwari Lal was also impleaded as appellant No. 2, the powers of this Court to reverse or vary the decree in favour of all the defendants can well be exercised under Order 41, Rule 4, C. P. C. and it cannot be said that the decree is a nullity. It is also contended that there is no case of exercise of inherent powers of this court, is made out by the plaintiff-petitioners in the facts and circumstances of this case.

7. The first point which calls for determination is whether after deciding the appeal on merits on February 20, 1980, this Court is competent to entertain an application under Section 151. C. P. C. Mr. Rastogi in this regard has cited *Mt. Surji v. Manki Ram* : AIR 1951 All 381, *P.M.M. Pillayathiri Amma v. K. Lakshmi Amma* AIR 1967 Ker 135, and *Devi Dayal Textile Company v. Nand Lal* AIR 1977 Delhi 7. It is no doubt true that in the above cases the view has been taken that the court passing the decree can exercise its power under Section 151, C. P. C. to set aside the decree passed by it where it is a nullity or where it has been passed due to mistake of the court. In the two cases of Allahabad High Court and Delhi High Court mentioned above, the decree has been passed on account of the mistake of the court itself. The Court exercised its inherent powers on the ground that no person should be prejudiced on account of the mistake of the Court. The facts of the case before me are entirely distinguishable as no mistake was committed by this Court in passing the judgment and decree on February 20, 1980 as the fact about the death of Banwari Lal was not brought to the notice of the Court by either of the parties. Mr. Rastogi has contended that it was the duty of the appellants to have brought this fact to the notice of the Court and if on this account the mistake has been committed in passing the judgment then it should be deemed to be a mistake of the Court. I am not impressed with this argument. In cases where the inherent powers are exercised on this account it must be a mistake committed by the court itself and not because a wrong judgment has been given by the Court on account of the negligence or inaction on the part of a litigant. In the case decided by the Kerala High Court in *P.M.M. Pillayathiri Amma's case* (supra) the question had arisen at the execution stage. The plaintiffs in whose favour the decree was

passed when submitted an application for execution, the legal representatives of deceased respondent had raised an objection that they were not impleaded as parties in the appeal and as such the decree passed against deceased respondent was a nullity. Thus the facts in that case were also entirely different. In the case before me the plaintiff-respondents were given full opportunity of hearing and one of the appellants has died, without legal representatives having been brought on record. Section 151, C. P. C. lays down that nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the court to make such order as may be necessary for the ends of justice or to prevent abuse of the process of the court. Thus, the inherent powers under Section 151, C. P. C. can be exercised by the court only in order to meet the ends of justice or to prevent abuse of the process of the court. There is no question at all of preventing the abuse of the process of the Court in the facts and circumstances of the case before me. So far as the ends of justice are concerned it cannot be said that any injustice has been done to the respondents when they had been given full opportunity of hearing in the case. I am informed by Mr. Datt that the respondents have filed a special appeal before the Division Bench against the judgment of this Court dated February 20, 1980, though no notice has been served on the defendant Onkar Mal as yet, and as such any grievance in this regard, if at all survives to the plaintiff-respondents, they can urge the same in the appeal.

8. The question whether the judgment and decree passed by this Court on February 20, 1980, is a nullity or not is also not free from difficulty as it firstly depends upon the various allegations and counter allegations made by the parties in the application and the replies and counter replies filed by them and the question whether this Court could have exercised its powers under Order 41, Rule 4, C. P. C., is also arguable in view of the various decisions of this court and Hon'ble the Supreme Court. In the view I am taking as mentioned above that no case for exercise of inherent powers of this Court under Section 151, C. P. C. is made out, I don't consider it necessary to decide the question whether the judgment and decree passed by this Court on February 20, 1980, is a nullity or not in view of the provisions of Order 41, Rule 4, C. P. C.

9. In the result I find no force in the petition filed by the plaintiff-respondents on March 12, 1980 under Section 151, Civil P. C., 1908, and the same is dismissed with costs

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