Kanailal Manna and ors. Vs. Bhabataran Santra and ors.

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Court : Kolkata

Decided On : Jun-13-1969

Reported in : AIR1970Cal99

Judge : S.K. Chakravarti and ;Anil K. Sen, JJ.

Acts : Code of Civil Procedure (CPC) , 1908 - Order 22, Rules 1, 3 and 9

Appeal No. : A.F.A.D. No. 757 of 1959

Appellant : Kanailal Manna and ors.

Respondent : Bhabataran Santra and ors.

Advocate for Def. : Manindra Nath Ghose, ;Sudhanshu Kumar De and ;Anil Kumar Sett, Advs.

Advocate for Pet/Ap. : Shyamacharan Mitter and ;Shyama Prasanna Roy Cohudhury, Advs.

Disposition : Appeal allowed

Judgement :

Anil K. Sen, J.

1. This appeal from appellate decree is at the instance of defendant Nos. 4, 5 and 6 who are the transferees from defendant Nos. 2 and 3. The appeal arises out of a suit for declaration of title and possession of the properties described in the two schedules to the plaint brought by the three plaintiffs Bhabataran, Nrityataran and Gobardhan.

2. On May 19, 1913 one Kiranbala Dassi, a child widow sold away all her husband's properties to her husband's brother Srinibas the father of defendants 2 and 3 and came to live with her father and her brothers, the plaintiffs as aforesaid; the three plots of land which constitute the suit property, were purchased by her by three documents respectively dated May 18, 1924, November 19, 1928 and December 20, 1934; she died while possessing and enjoying these properties in 1360 B. S.; and it appears that later in her life she had separated even from her brothers, the plaintiffs, and was living in a homestead situate on a part of the suit property.

3. Plaintiffs claimed that of the two schedules, the first one was purchased by them in the benami of their sister late Kiranbala and that the second schedule was purchased by her out of her, 'Stridhan' money and that on the death of Kiranbala they inherited the second schedule--the first schedule remaining their own property; in respect of the first schedule they had made an alternative claim namely that even if it was purchased by Kiranbala it was purchased out of her 'Stridhan' money and as such they had inherited the same too; they instituted the suit because defendant No. 1, who was a bargadar, had set up a claim that on the death of Kiranbala it was defendants 2 and 3, her husband's brother's sons, who became the owners of the properties and because the plaintiffs also came to know that the defendants 2 and 3 treating the properties

to be a part of their inheritance on the death of Kiranbala sold the same to defendants 4, 5 and 6, appellants.

4. The suit was contested by three sets of defendants, namely, defendant No. 1, defendant Nos. 2 and 3 and defendant Nos. 4 to 6.

5. Defendant No. I only pleaded that he was a bargadar in respect of all the three plots previously under Kiranbala and since her death he had been paying the bhag produce to defendant No. 2 and 3.

6. The defence of the other two sets of defendants were more or less the same; their claim was that all these properties were purchased by Kiranbala out of the purchase money which she had received from the father of the defendants 2 and 3 by selling her husband's properties in the year 1913 and as such must be treated to be accretions to the husband's estate which devolved on the death of Kiranbala on defendants 2 and 3 who, in their turn, lawfully transferred the same on December 8, 1953 in favour of defendants 4. 6.

7. In substance there was a rival claim to the suit properties left behind by Kiranbala plaintiffs claiming as preferential heirs as her brothers treating the property to be a part of her 'Stridhan' while defendants 2 and 3 and through them the defendants 4-6 lay their claim by inheritance treating it to be a part of her husband's estate. It is, however, clear and undisputed that as amongst the plaintiffs the claim was one of joint title by inheritance.

8. The learned Judge in the trial Court decreed the suit on a finding that the properties of both the schedules were 'Stridhan' properties of Kiranbala and that the plaintiffs are the preferential heirs; claim for possession however was decreed through defendant no. 1, the bargadar.

9. Against the said decree the defendants 4 to 6 preferred an appeal before the lower appellate court which was registered as Title Appeal No. 60 of 1957.

The appeal was heard on January 7, 1959 and was dismissed on merits on January 17, 1959. The learned Judge in the court of appeal below came to the same conclusion as the trial Court but on somewhat different reasonings.

10. It is not disputed before us that if the suit properties be a part of the acquisition by Kiranbala out of 'Stridhan' money plaintiffs would be preferential heirs to the defendants 2 and 3.

11. An unfortunate event, however, happened before the appeal was heard and disposed of by the Court of Appeal below namely one of the plaintiff-respondents Nrityataran Satra died on January 12, 1958; none of the parties brought the said fact to the notice of the Court of appeal below and as such the decree proceeded on ignorance of such death and against a dead person. The defendants 4 to 6 preferred the present second appeal to this court treating the said Nrityataran to be alive but when in course of proceedings for service of summons it transpired that he had died, her heirs and legal representatives were added as parties-respondents to the present second appeal.

12. After Mr. Shyamacharan Mitter had opened the appeal on behalf of the appellants, Mr. Manindranath Ghosh appearing with Mr. Anil Kumar Sett on behalf of the plaintiffs including the heirs and legal representatives of Nrityataran took a preliminary objection that the decree passed by the trial court in favour of the plaintiffs being a joint decree on the death of one of the plaintiffs with consequent abatement as against him, the entire appeal before the lower appellate court should be deemed to have abated.

13. On the facts set out hereinbefore, there is no dispute that the title set up by the plaintiffs is an indivisible one and the consequent decree was a joint decree in favour of all of them. It is also not disputed that Nrityataran, one of the plaintiffs, having died on January 12, 1958 and 90 days having elapsed even prior to the hearing of the appeal by the Court of appeal below there was abatement of the appeal as against the said plaintiff respondent, Nrityataran. The effect of such abatement against one of the plaintiffs is either that the said appeal became imperfectly or improperly constituted against the others so that the same has to be

dismissed vide State of Punjab v. Nathu Ram, : [1962]2SCR636 ; Kalidayal Bhattacharya v. Nagendra Nath, 30 Cal LJ 217 = (AIR 1920 Cal 264) or as is more commonly said that the entire appeal had abated vide Ramsarup v. Munshi, : [1963]3SCR858 . There is no dispute that whichever view be taken the effect is the same, namely, that the entire appeal must fail solely on account of the abatement in respect of one of the plaintiffs in whose favour the decree had been passed when such decree proceeds upon common grounds vide Rameshwar v. Shyambehari, : [1964]3SCR549 . Mr. Shyamacharan Mitter appearing for the appellants in his usual fairness has not disputed this proposition. He however has contended that as the decree was passed in ignorance of death of a person against whom there had been an abatement which in law leads to the failure of the entire appeal, his clients should be given an opportunity to have the abatement set aside under Order 22, Rule 9 of the Code of Civil Procedure and for that purpose the ineffective decree passed in the present case by the court of appeal below should be set aside and the appeal should be remanded to the court of appeal below to be reheard after giving his clients such an opportunity. As a matter of fact, in course of the argument Mr. Mitter even in this court made an oral prayer for setting aside the abatement in support whereof he had subsequently filed an application to that effect before us.

14. Mr. Ghosh appearing for the plaintiff-respondents, however, has strongly contested the submission made by Mr. Mitter: according to him this Court must hold that on the death of one of the plaintiff-respondents with consequent abatement as against him the entire appeal before the lower appellate court must be deemed to have abated and as such this Court should only hold that only effective decree which is binding between the parties is that passed by the trial court and we must affirm the same. Alternatively Mr. Ghosh has contended that as in the present case the decree passed by the lower appellate court is not one against but in favour of a person who is dead, none but the heirs and legal representatives of the deceased should be allowed to dispute the validity of the decree on the ground of abatement; so according to Mr. Ghosh we should treat the appeal to be one which had been disposed of on merits by the Court of appeal below and proceed to hear the second appeal on its merits too.

15. It is this rival contention which raises a somewhat difficult question of practice to be followed in law in the aforesaid circumstances where a decree has been passed in favour of a dead person in ignorance of such death and in ignorance of the fact that the appeal itself had abated.

16. We must, however, hold that the two contentions put forward by Mr. Ghosh are somewhat inconsistent with each other; because if we accept his first contention and hold that the entire appeal had abated on the death of one of the plaintiff-respondents in the court of appeal below, we cannot yet consider the decree passed to be one on its merits nor could we go to hear the present second appeal on its merits. In our opinion if after hearing the present second appeal on its merits we come to a conclusion different from those arrived at the courts below, we are to pass a decree against the plaintiffs including the deceased plaintiff but that we cannot do in the present case because as against the deceased plaintiff the appeal had already abated by operation of law and there is no effective decree in the court of appeal below. Of course Mr. Ghosh has relied on two decisions of this Court in support of his second contention, namely, Himangshu v. Monindra, : AIR1954Cal205 and Noai Chowkidar v. Official Trustee : AIR1929Cal527 ; he has also relied on the decision in the case of P.M.A.M.V. Chetty v. J.M. Ayer, ILR 39 Mad 386 = 28 Mad LJ 138 = (AIR 1916 Mad 574). In our opinion, however, none of these three cases had considered the effect of abatement on the proceedings. In the case of : AIR1954Cal205 (supra) the legal representatives of the deceased party were already on record and his Lordship P.N. Mukherjee, J. (as his Lordship then was) only affirmed the legal proposition that an order or a decree in favour of a dead person is not always a nullity. In the case of : AIR1929Cal527 (supra) there was a proceeding under Order 21. Rule 90 of the Code of Civil Procedure against a decree-holder auction purchaser which was allowed by the trial court on December 17, 1926; there was an appeal by such decree-holder auction purchaser and pending the appeal he died on January 1, 1928 but the appellate court allowed the appeal in favour of the deceased appellant on January 30, 1928 in ignorance of his death; in such circumstances the petitioners in the proceedings under Order 21, Rule 90 of the Code of Civil Procedure wanted to have the appellate judgment set aside because of such death and this court, however, overruled

such a claim on the view that it was only the heirs and legal representatives of such a deceased party who can ask for vacating such an order but not the others. It should be noted that on the day when the appeal was allowed there was no abatement and this court affirmed the legal position that an order in favour of a dead person is not altogether and in all circumstances a nullity. The learned Judge relied on the decision in the case of Duke v. Devis. (1893) 2 QB 260 and in particular on the following observations from the said decision: 'The learned Lord Justice points out that if a party is dead, the records stand good so far as the living parties are concerned; and that any disposal of the case notwithstanding the death of one of the parties will be valid subject to its being vacated at the instance of the legal representatives of the persons who had died.' In the case of ILR 39 Mad 386 = 28 Mad LJ 138 = (AIR 1916 Mad 574) (supral the death was only two days prior to the judgment and the Madras High Court held that in such circumstances by the death there was no abatement of the suit and the unsuccessful litigant has no right to re-argue the matter on the ground that one of the other parties was dead.

17. In our opinion in all the above cases relied on by Mr. Ghosh the distinguishing feature is that there was no abatement even as against the deceased party. None of these cases, ever considered the position as in the present case where by operation of law there had been an abatement of the proceedings not only against the party deceased but as a whole. We are of the opinion that the fact of abatement is a distinguishing feature of great importance particularly where the decree proceeds on common grounds. We are of the opinion that on the facts of the present case on the death of one of the plaintiff-respondents in the court of appeal below the appellants before the said court who are also the appellants before us could no longer have in law invited the said court to adjudicate upon matters in controversy vide 30 Cal LJ 217 = (AIR 1920 Cal 264). It has also been made expressly clear by the Supreme Court now that in such circumstances the court of appeal below could not but dismiss the appeal because of abatement against one of the plaintiff-respondents on the ground of defect in the constitution of the appeal without going into merits. If that is the clear position in law it matters little whether the court of appeal below had gone on the merits and decided the appeal on such merits in ignorance of the death and the abatement. We are therefore unable to consider the judgment and decree rendered by the court of appeal below to be any way effective in law on its merits and even if the Court of appeal below had done so we must hold that the said court had done it erroneously although the error might have arisen because of ignorance of the death. On the above conclusions we must overrule the second contention of Mr. Ghosh.

18. We now proceed to consider whether we should adopt the other procedure contended for by Mr. Ghosh namely that we should hold the appeal before the court of appeal below to have abated as a whole and restore the decree as passed by the trial Court or we should adopt the procedure contended for by Mr. Mitter namely that we should set aside the decree passed by the Court of appeal below and send the case back to the said court for re-hearing.

19. Before going into this question we should dispose of Mr. Mitter's prayer before us made on behalf of his clients for setting aside the abatement on the death of Nrityataran under the provisions of Order 22, Rule 9 of the Code of Civil Procedure. We must say that it is now more or less well settled and accepted by the different High Courts that it is the court where abatement has taken place which alone is competent to deal with a prayer for setting aside the abatement. It would be sufficient to refer to one of the Bench decisions of this court in the case of Promode v. Abdul Majid, AIR 1919 Cal 242(1) and we must further say that the contrary proposition laid down by a single Bench in the case of Nabakumar Roy Chowdhury v. Prafulla Chandra Chowdhury, (1947) 51 Cal WN 654 which took no notice of the earlier Bench decision referred to above does not represent the correct view. Therefore Mr. Mitter's prayer for setting aside the abatement before us is misconceived and we are not entitled in law to adjudicate upon the said prayer or the application filed by Mr. Mitter in support thereof before us.

20. In support of his contention that we should affirm the decision of the trial court. Mr. Ghosh has relied on a decision of this court in the case of Balaram v. Kanysha Majhi, AIR 1919 Cal 410 = 53 Ind Cas 480. In the said case there was an appeal by the unsuccessful plaintiffs; pending the appeal one of the appellants died and his

heirs and legal representatives were not brought on record and the Court of appeal below decreed the appeal and passed a decree in favour of all the plaintiffs in ignorance of death of one of them. The facts recited show that the decree was passed after 33 days from the date of death and it is not clear how their Lordships proceeded on the basis that there had been an abatement of the appeal. Of course this Court in the said case on a further appeal by the defendants declared the decree passed by the court of appeal below to be a nullity and restored the decree as passed by the trial Court. Apart from the fact that there is some doubt as to whether there was at all any abatement in the said case what prevailed upon the learned Judges disposing of the said case to hold as they did, was that it was one of plaintiffs-appellants who had died and no attempt was made to substitute the heirs of the deceased plaintiff, such death being obviously known to the plaintiffs. In any event on the facts of the case, it appears this Court never considered any prayer for an opportunity to have the abatement set aside perhaps because on the facts there was no scope for affording any such opportunity.

21. On the other hand, Mr. Shyamacharan Mitter has relied on a number of decisions from different High Courts in support of his proposition that on the facts of a given case like the present one the only course that should be followed in law is to vacate the ineffective decree and remand the proceedings to the Court where abatement had taken effect to give the parties an opportunity to have the abatement set aside and to have the appeal effectively disposed of on merits. He has referred to a decision of the Madras High Court in the case of American Baptist Foreign Mission Society v. A. Pattabhiramayya, AIR 1919 Mad 685 at p. 690, a Bench decision of Bombay High Court in the case of A. Indra Sangi v. Desai Umed, AIR 1925 Bom 290 and four decisions of the Patna High Court in the cases of Ramsaran v. Prithvi Nath, : AIR1952Pat267 . Mrs. Gladys Coutts v. Dharkhan Singh, : AIR1956Pat373 , Kameshwar Pandey v. Dwelal Bohri, : AIR1964Pat247 and Sukhur Sah v. D. Tewari, (1961) ILR 40 Pat 61. It may be pointed out that the Bench decision in the case of : AIR1956Pat373 , had considered a number of decisions on the point including many of the decisions relied on by Mr. Ghosh in coming to the conclusion that the proper procedure to be followed is to set aside the ineffective decree and remand the case to the court where the abatement had taken effect. Mr. Mitter has also relied on the observations made by this court in the case of AIR 1919 Cal 242 (1) (supra) to the effect 'if the applicant has any remedy, he is to make a proper application to the proper court if so advised.' The remedy referred to is obviously remedy against the abatement. Mr. Mitter relies on this observation for contending that his clients should not be denied an opportunity to seek the remedy.

22. We are of the opinion that if we accept the contention of Mr. Ghosh and affirm the decree as passed by the trial Court we only take away a valuable right of the appellants before us to seek the remedy provided under law for setting aside the abatement consequent upon the death of one of the respondents. The statute has given him this right under Order 22, Rule 9 of the Code of Civil Procedure and it would not be just and proper to deprive the party of such a valuable right. If we have come to the conclusion that we are unable to entertain any application on behalf of the present appellants for having abatement, which has taken place in the court of appeal below, set aside it is but lust and proper that we must at the same time see that he gets an opportunity to move the appropriate court with such a prayer. But if we, on the other hand, accepting the contention of Mr. Ghosh in the meantime, affirm the decision as passed by the trial court we are afraid the Court of appeal below would no longer have any scope to entertain effectively any application for setting aside the abatement. In such circumstances, in our opinion, the uniform procedure followed by the other High Courts as referred to hereinbefore should be accepted, namely, the ineffective decree passed by the court of appeal below should be set aside and the appeal should be remanded to the said court, keeping it open to the appellants to move the said court for an opportunity to have the abatement set aside if the appellants could satisfy the said court that they are so entitled in law. In our opinion the decision relied upon by Mr. Ghosh in the case of AIR 1919 Cal 410 (supra) does not really go counter to the view we have taken; we are further fortified in our conclusion by the underlying principle of the Bench decision of this court in the case of Abdul v. Lakhisree Mazumdar, AIR 1923 Cal 676. In that case abatement had taken place pending a second appeal in this court and this court in ignorance of death decreed the second appeal and remanded the proceedings to the court of the District Judge, who however, considered the remand order to be wholly

without jurisdiction because of the abatement and he further held that the decree as passed by the lower appellate court prior to remand should be restored. On a fresh second appeal to this court Asutosh Mukherjee, J., condemned the procedure followed by the District Judge and held that the proper procedure should have been to report the fact to the Court which had passed the remand order in ignorance of the death. His Lordship further went on to allow the appeal, set aside the decree passed by the District Judge after remand to remand the case once more and then recall the same to the file of this Court so that it may be placed before the appropriate Bench which had decided the appeal on the previous occasion. In our opinion the procedure followed in the above case on principle is in consonance with the view we have taken.

23. It is true that the litigation out of which the present appeal arises was started as early as in the year 1954 and it is unfortunate that we have to remand the case to the court of appeal below once more even at the instance of an unsuccessful party before the said court after so many years but on the view we have taken no alternative is open to us. We would only direct that the court of appeal below should now try to dispose of the appeal at the earliest possible time.

24. We therefore allow this appeal, set aside the decree dated January 17, 1959 passed by the Court of appeal below and remand the appeal to the said court to re-hear the same, taking into consideration the effect of the abatement as against the plaintiff-respondent Nrityataran, subject, however, to his giving an opportunity to the appellants to have such abatement set aside in accordance with the law. We further direct that the application filed before us under Order 22, Rule 9 of the Code of Civil Procedure by the appellants should also be sent to the said court for being disposed of on its merits. We however make it clear that we have not expressed any opinion whatsoever on the merits of the appellants' prayer for setting aside the abatement. There will be no order as to costs.

S.K. Chakravarti, J.

25. I agree.