

Netar and ors. Vs. Jagta

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Court : Himachal Pradesh

Decided On : Aug-01-1984

Reported in : AIR1985HP88

Judge : H.S. Thakur, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 22, Rule 2

Appeal No. : R.S.A. No. 30 of 1971

Appellant : Netar and ors.

Respondent : Jagta

Advocate for Def. : D.D. Sud, Adv. vice; Chhabil Dass, Adv.

Advocate for Pet/Ap. : Dalip Kumar Sharma, Adv.

Disposition : Appeal dismissed

Judgement :

H.S. Thakur, J.

1. This appeal is directed against the decree and judgment passed by the learned Additional District Judge, Kangra on 31-8-1970, dismissing the appeal, on the solitary ground of the same having abated in its entirety.

2. Necessary facts relevant to decide this point may be stated. The respondent/plaintiff filed a suit for the possession of land in suit which was decreed in his favour and against the appellants/defendants. An appeal was preferred against the decree and judgment passed by the trial Court. Chand, one of the appellants, during the pendency of the appeal died and his legal representatives were not brought on record within limitation. Accordingly, the learned Additional District Judge dismissed the appeal as having abated in its entirety. Aggrieved by the said judgment and decree, the appellants have preferred this appeal.

3. It is contended by the learned counsel for the appellants that the appeal has abated qua Chand alone and not against the present appellants. The learned counsel has placed reliance on a Full Bench judgment in Sant Singh v. Gulab Singh AIR 1928 Lah 572. The question of law, which was referred to a Full Bench, has been illustrated as follows :

'X sells immovable property to A, B, C and D. In the sale-deed it is stated that the property has been sold to the vendees in equal shares. The reversioners of the vendor institute a suit for declaration that the sale shall not affect their reversionary rights after the vendor's death. The suit is dismissed and the plaintiffs appeal. During the pendency of the appeal A, one of the vendees, dies and as his representatives are not brought on the record within time the appeal abates as against A. Can the appeal proceed against B, C and D, the surviving vendees-respondents, or must the abatement of the appeal as against A result in a dismissal of the appeal in its entirety?' The relevant observations may be extracted :

'Whether the appeal can, or cannot, proceed in the absence of the legal representatives of the deceased respondent must depend upon the nature of each case, and it is not possible to formulate a rule of general application. It is obvious that if the action, which has given rise to the appeal, could have been brought without impleading the person who has died, his death affects only the interest, if any, which he had in the litigation, but it cannot prevent the determination of the rest of the claim. This rule does not, however, solve the problem in every case. The test often adopted in such cases is whether in the event of the appeal being allowed as against the remaining respondents there

would or would not be two contradictory decrees in the same litigation with respect to the same subject-matter. It is matter of common sense that the Court should not be called upon to make two inconsistent decrees about the same property, and in order to avoid conflicting decrees the Court has no alternative but to dismiss the appeal as a whole. If, on the other hand, the success of the appeal would not lead to such a result, there is no valid reason why the Court should not hear the appeal and adjudicate upon the dispute between the parties who are before it.

Now, in the present case, though there is one conveyance in favour of four persons; the share taken by each vendee is clearly specified in the deed. On principle there is no real distinction between one deed transferring the whole of the immovable property in equal shares to A, B, C and D, and four deeds, each conveying one-fourth share in the property, to the four vendees respectively. The death of A pending the appeal undoubtedly debars the Court of appeal from dealing with his share, but his absence does not prevent the Court from determining the controversy with respect to the shares of the remaining three vendees. There might be one decree as to A's share, and another decree of an inconsistent character governing the shares of the other vendees; but, as these decrees do not affect the same property, there is no legal difficulty in giving effect to them. We are here not dealing with a case in which one decision settles the dispute one way, and another decision determines it in an entirely another way, with respect to the same matter, so that it becomes impossible for the Court to carry out both the decisions at the same time.'

Ultimately, the answer to the question was that the appeal in this case did not abate in toto and could proceed against B, C and D. This view was also followed in a Full Bench decision in *Nanak v. Ahmad Ali*, AIR 1946, Lah 399.

4. The learned counsel for the respondent has pointed out that the view taken in the aforesaid Full Bench decisions has been repelled by the Supreme Court in *Sri Chand v. M/s Jagdish Pershad Kishan Chand*, AIR 1966 SC 1427 and in *State of Punjab v. Nathu Ram*, AIR 1962 SC 89. In *Sri Chands* case (*supra*) a surety bond was furnished by five sureties and they mortgaged the property specified in the schedule annexed thereto and jointly and severally agreed that if any decree was

passed against the second respondent, they shall comply with the same and in default the amount payable under the decree shall be realised from the properties mortgaged. Such a surety bond was not registered. A decree having been passed, respondent 1 applied to execute the decree against the surety. The surety objected to the execution of the decree, inter alia, on the ground that the surety bond was not being registered, the application for execution must fail. The objections raised by the sureties were rejected. An appeal was filed in the High Court of Punjab and the same was dismissed and the Letters Patent Appeal was also dismissed. Special leave was granted by the Supreme Court. One of the appellants died before the record of the appeal was transmitted to the Supreme Court. The heirs and legal representatives of the deceased-surety applied for being impleaded as legal representatives on the record of the appeal. The application was, however, dismissed. Under the circumstances, their Lordships of the Supreme Court while extracting the observations from a previous decision of that Court in *State of Punjab v. Nathu Ram*, AIR 1962 SC 89 came to the following conclusion :

'Liability of the sureties is under the law joint and several. If a creditor seeks to enforce the surety bond against some only of the joint sureties, the other sureties will not on that account be discharged; nor will release by the creditor of one of them discharge the other : vide Sections 137 and 138, Contract Act. But the fact that the surety bond is enforceable against each surety severally, and that it is open to the creditor to release one or more of the joint sureties, does not alter the true character of an adjudication of the Court when proceedings are commenced to enforce the covenants of the bond against all the sureties. We are not concerned in this appeal with the privilege which a creditor may exercise, but with the effect of an adjudication which the Court has made in a proceeding to enforce the covenant of the Bond. The mere fact that the obligation arising under a covenant may be enforced severally against all the covenanters does not make the liability of each covenanter distinct. It is true that in enforcement of the claim of the decree-holder the properties belonging to the sureties individually may be sold separately. But that is because the properties are separately owned and not because the liability arises under distinct transactions.

It must, therefore, be held that the appeal has abated, because the representatives of the second appellant, Basant Lal have not been brought on record within the time permitted by Rule 14 of Order 16, Supreme Court Rules, 1950. and the delay in filing the petition to bring the representatives on record has not been condoned.'

5. In respect of the case in hand, the respondent had filed a suit against the appellants and the deceased Chand, for the possession of the land in dispute. A decree against all of them for possession of the land was passed by the trial Court. The said decree was affirmed by the lower appellate court on the ground that the appeal had abated in its entirety.

6. I have considered the respective contentions of the learned counsel for the parties. I am of the opinion that the view which has been taken in the Full Bench decisions of Lahore High Court is inconsistent with the view taken by their Lordships of the Supreme Court in the aforesaid decisions.

7. Under the circumstances, the inevitable conclusion that can be drawn on the basis of the aforesaid decisions of the Supreme Court is that the view taken by the lower appellate Court is correct that the appeal has abated in its entirety. Consequently, the appeal is dismissed, but keeping in view the circumstances of the case, the parties are left to bear their own costs.