

Munshi Ram Vs. Kamla Devi and ors. Etc.

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Court : Himachal Pradesh

Decided On : May-16-2005

Reported in : AIR2006HP19

Judge : Deepak Gupta, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Section 151 - Order 1, Rule 10

Appeal No. : F.A.O. Nos. 559 and 560 of 2003

Appellant : Munshi Ram

Respondent : Kamla Devi and ors. Etc.

Advocate for Def. : Rohit Sharma, Adv.

Advocate for Pet/Ap. : Ajay Sharma, Adv.

Disposition : Appeal allowed

Judgement :

Deepak Gupta, J.

1. This judgment shall dispose of two appeals being FAO Nos. 559 and 560 of 2003 since they arise out of the same suit and two virtually identical orders passed in two separate appeals arising out of the said suit.

2. The facts which are necessary for decision of this case are that the present appellant was the plaintiff in the trial Court. He filed a suit against Amin Chand, predecessor-in-interest of respondents No. 3 and 4 and all the other respondents, including Bhagwati Devi. Bhagwati Devi was defendant No. 5 in the said suit. In the suit it was prayed that a decree for declaration be granted to the effect that the plaintiff is owner in possession to the extent of 23/180 share in the suit land. It was also prayed that the judgment and decree in civil suit No. 225/91, titled Kamla Devi v. Ichhlya Devi, decided on 23-9-1991 be declared to be collusive and null and void,

3. It Would be useful to quote Para 8 of the plaint :

8. That there is no dispute with the shares of those defendants who were not parties to the Civil Suit 225/91. However the suit will also ensure for their benefit and they are being impleaded only as whole khata is involved and declaratory relief is being obtained.

4 Amin Chand defendant No. 1 Bhagwati Devi, defendant No. 5 and Savitri Devi, defendant No. 6 were admittedly not parties to the earlier suit being Civil Suit No. 225 of 1991. A joint written statement was filed by defendants No. 1 to 11. The suit was contested on many grounds. It was, however, admitted that defendant Nos. 1, 5 and 6 were not parties to the earlier suit and on this basis in reply to Para 8 it was stated as follows :

8. Denied. The suit is bad for misjoinder of parties as defendant Nos. 1, 5, 6 who has been dragged unnecessarily into the litigation. The defendant Nos. 5, 6 & 1 are entitled for special compensatory cost from the plaintiff.

5. The trial Court decreed the suit of the plaintiff and declared the plaintiff to be owner in possession of 23/180 share of the suit land. Against this judgment and decree two appeals were filed. Appeal No. 86-G/ 2001 was filed by the original defendants Nos. 7, 8, 9 and 10 and Civil Appeal No. 90/D of 2001 was filed by defendants No. 2 and 11. They were both assigned to different Courts.

6. Appeal No, 86 was assigned to ADJ (I), Kangra. On 15-6-2002 it was reported that respondent No. 8 Bhagwati (the original defendant No. 5) is reported to have died. On 26-11-2002 the appellants in the said appeal moved an application under Order 1 Rule 10 C.P.C. for deleting the name of Bhagwati. In this application it was alleged that the said respondent No. 8, Bhagwati had already transferred her share in the land in dispute vide mutation No. 122, dated 26-5-1992 in favour of the original defendants No. 1, 2, 3, 4, 7, 8 and 12. It was prayed that she was not necessary party and may be deleted from the array of respondents. On this application the learned Additional District Judge (I) passed the following order on 6-5-2003 :---

Reply to application under Order 1 Rule 10 C.P.C. not filed. In view of the facts narrated by the present appellant in the application under Order 1 Rule 10 C.P.C. which are duly supported by an affidavit and also accompanied with the copy of mutation No. 122 dated 26-5-1992, whereby the deceased proforma/respondent Bhagwati Devi respondent No. 8 transferred her interest in the suit property in the name of Kewal Krishan, Bal Krishan, Vijay Kumar, Amin Chand, Roshan Lal, Parmeshwari Devi, Amrit Lal, all these persons are already on record as respondents. Accordingly, deceased/respondent No. 8 has no interest in the suit property, therefore, prayer of the appellant is allowed and the name of deceased/respondent Bhagwati Devi is ordered to be deleted from the memorandum of appeal.

Now record of the Id. Trial Court be requisitioned for 18-6-2003.

7. In the other appeal being Civil Appeal No. 90-D/2000 filed by defendants No. 1 and 11 also it was reported on 16-11-2002 that Bhagwati Devi, defendant No. 6 in the said appeal is dead. Thereafter the appellant moved an application under Section 151 C.P.C. praying that since Bhagwati Devi had died during the pendency of the suit, the matter be remanded to the trial Court. This appeal was pending in the Court of A.D.J. (II). This application remained pending. In the meantime, an application was filed before the learned District Judge for clubbing both the two appeals. This application was allowed on 24-6-2003 and both the appeals were assigned to A.D.J. (II), Dharamsala for disposal in accordance with

law. The learned A.D.J. (II), Dharamsala vide the impugned judgments has held that since Bhagwati Devi had died during the pendency of the case before the trial Court, it was for the trial Court to decide the question whether the suit had abated or not. He accordingly set aside the judgment and decree of the trial Court and remanded the case to the trial Court for decision afresh.

8. Aggrieved against this order of the learned lower appellate Court in both the appeals the present appeals have been filed.

9. Mr. Ajay Sharma, learned Counsel for the appellant, has urged that the lower appellate Court has gravely erred in remanding the case. He submits that in the facts of the present case the deceased Bhagwati Devi was not a necessary party and at best a proper party in the suit. The plaintiff had not claimed any relief whatsoever against her. She was arrayed as a defendant only because her name was reflected in the joint Khata. In fact the defendants including the appellant in both the appeals had specifically taken up a plea in their joint written statement that she is an unnecessary party and, therefore, she was entitled to compensatory costs. He submits that there was no decree against her. He, therefore, argues that her name should have been ordered to be deleted and the case could not have been remanded for fresh decision.

10. On the other hand, Mr. Rohit Sharma, learned Counsel for the respondents, submitted that it is only the trial Court which could have decided the question whether the suit had abated or not. In support of his case he places reliance on a judgment of this Court in *Tulsi Ram v. Smt. Krishni Devi* 2000 (2) Sim LC 172 : 2001 AIHC 1950.

11. It is no doubt true that in this judgment it has been held that when a question arises whether a suit or appeal has abated then this should be decided by the Court in which the suit or appeal was pending at the time of death of the party and where the abatement, if any, took place. Each case has to be decided on its own facts. In my opinion, in view of the peculiar facts of the present case the judgment cannot be applied to the present case. In the present appeals the case of both the sides is that no relief was claimed against Smt. Bhagwati in the suit. The defendants had gone to the extent of claiming that since she was an unnecessary

party and had been unnecessarily dragged into the litigation, she was entitled to special costs. The plaintiff in his plaint had clearly stated that he has not claimed any relief against her. Therefore, her absence in the suit would have had no effect on the maintainability of the suit.

12. The second aspect is that, as noted above, in Civil Appeal 86 the appellants before the trial Court had moved an application for deletion of the name of Smt. Bhagwati on the ground that she had relinquished her share in favour of persons who were already on record. It was alleged that this relinquishment had taken place in the year 1992. The A.D.J. (I) had accepted this contention and ordered the deletion of her name.

13. From the facts narrated above, it is absolutely clear that Smt. Bhagwati was not a necessary party to the suit. No relief had been claimed against her and she was not being affected by the decree. The plaintiff had in fact clearly stated that he was not challenging her share in the land. The decree does not operate against her. Therefore, the decree passed by the trial Court cannot be said to be a nullity. The appeal filed could proceed after deleting the name of Bhagwati. No abatement in this case could have taken place since even according to the respondents, she had relinquished her share in favour of the persons who were already on record. It would be pointless, therefore, to remand the case to the trial Court.

14. The trial Court after recording evidence and hearing the parties has passed a detailed judgment decreeing the suit. It would be pointless to set aside this judgment which has been delivered on merits and remand the case to the trial Court when it is apparent that the suit did not abate on the death of defendant Bhagwati Devi. Proceedings which have been going on for a number of years cannot be set at naught merely due to the fact that one of the defendants against whom no relief was claimed and who was not even necessary party to the proceedings has died.

15. In view of the above discussion, the present appeal is allowed and the judgments of the learned lower appellate Court dated 23-10-2003 remanding the case to the trial Court in both the cases are set aside and the lower appellate Court is directed to decide both the appeals on merits.

16. The parties through their counsel are directed to appear before the lower appellate Court on 27th June, 2005. The lower appellate Court shall send notices only to those parties who are not represented in this Court. Notices can be sent through their counsel also. Since both the appeals are old ones, the learned appellate Court is directed to decide the appeals as expeditiously as possible and in any event not later than 31st December, 2005. No costs.

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