

Asha Sehgal and ors Vs. Rajinder Kumar Sehgal

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Court : Delhi

Decided On : Feb-23-2011

Judge : Mool Chand Garg, J.

Acts : Code of Civil Procedure (CPC) - Orders 1, 22, 43 Rules 10, 3, 9(1) - Section 96

Appeal No. : FAO.No.374/2010

Appellant : Asha Sehgal and ors

Respondent : Rajinder Kumar Sehgal

Advocate for Def. : Mr.Maninder Jeet Singh, Adv.

Advocate for Pet/Ap. : Mr. A P S Ahluwalia; Mr.S.S.Ahluwalia, Adv.

Judgement :

1. Whether reporters of Local papers may be Yes allowed to see the judgment?
2. To be referred to the reporter or not? Yes
3. Whether the judgment should be reported in Yes the Digest?

1. The appellant is aggrieved of the order passed by the Additional District Judge dated 2.5.2009, whereby the Id.Judge has allowed the appeal filed by the respondent against the order passed by the Id.Civil Judge, Delhi dated 13.04.2007 in Suit No. 13/06/03, whereby the application filed by the respondent under Order

1 Rule 10 and Order 22 Rule 3 CPC was dismissed and it was further ordered that in the absence of any legal heir of the deceased Smt.Agyawati Sehgal, who is the plaintiff in the suit, the suit also stands abated.

2. Briefly stating, the facts giving rise to filing of this appeal are that Smt.Agyawati Sehgal had filed a suit for possession and damages for use and occupation being mesne profits and for permanent injunction against the appellant claiming to be the absolute owner in possession of the entire property bearing No. B-10/19, Rajouri Garden, New Delhi, having inherited the same from her husband late Sh. Maya Ram Sehgal. Reliance was placed upon the will and testament dated 15.04.1968 executed by her husband Maya Ram Sehgal.

3. Appellants, who are the defendants in the suit, contested the alleged claim of Smt.Agyawati Sehgal. According to them they had been living in the first floor as co-owners since 1961 because late Sh. Maya Ram Sehgal and Sh.Ram Rakha Mal were real brothers and was a joint family before partition of the country in 1947. Sh. Ram Rakha Mal died before the partition of the country. Subsequently, the whole family migrated to Delhi from Lahore. Late Sh.Maya Ram Sehgal was the karta of the family which consisted of Sh.Maya Ram Sehgal, Sh.TirathRam, son of late Sh.Ram Rakha Mal and his two sons Sh.Surinder Kumar Sehgal and Sh.Rajinder Kumar Sehgal at Delhi. The family occupies house No. 9048 and 9049 in Gali No.1, Multani Dhanda, Paharganj, New Delhi. Then the family purchased the plot bearing No. B-10.19, Rajouri Garden, New Delhi in the name of Sh.Maya Ram Sehgal and a two storeyed house was built, the construction of which was completed in 1961. Family of both Sh.Maya Ram Sehgal and Sh.Tirath Ram Sehgal including Sh.Surinder Kumar Sehgal started living in the new house in Rajouri Garden in the year 1961. The late plaintiff, Smt.Agywati Sehgal and her husband Sh.Maya Ram Sehgal had no issue, but treated Sh.Surinder Kumar Sehgal as their son. Smt.Agyawati Sehgal had arranged the marriage of appellant no.1 with Sh.Surinder Kumar Sehgal in the same demised house and therefore, they have continued to live since 1961 on the first floor. The allegations of late plaintiff in the plaint were specifically denied that the appellants and their late father Sh.Surinder Kumar Sehgal were living on licence basis in the premises. It is also the case of the appellants that Sh.Maya Ram Sehgal, before his death on

11.10.1968 had left his final will dated 15.4.1968 under which he had bequeathed the demised house in favour of both Smt.Agyawati Sehgal and Sh.Surinder Kumar Sehgal. Hence under the said will they became co-owners.

4. Unfortunately, Smt.Agyawati Sehgal died on 22.02.2011. The present respondent filed an application alleging himself as the legal representative under the will left by Smt.Agyawati Sehgal and applied for his substitution under Order XXII Rule 3 CPC r/w Order X Rule 1 CPC.

5. The learned Civil Judge held a summary enquiry by recording evidence within the meaning of Order XXII Rule 5 CPC after framing an issue and returned a finding that neither the respondent was the legal representative nor he had any right to sue against the appellants and hence the application was rejected vide order dated 13.04.2007 declaring the suit to have abated by making a passing reference.

6. The respondent then preferred an appeal against the aforesaid order of the Id. Civil Judge. The appellants took a preliminary objection as to the maintainability of the appeal. It was their submission that no appeal was maintainable under law against the order of rejection of application dated 13.04.2007 filed under Order XXII Rule 3 and 5 CPC. The appeal was also belated. However, the delay was condoned and after hearing arguments the Id. ADJ has allowed the appeal and remanded the matter before the Id. Civil Judge for disposal of the suit on merits vide order dated 02.05.2009.

7. It is this order which has been appealed against by the appellant, who contends that in the absence of any provisions available in CPC entitling the respondent to file an appeal against the order of the Id. Civil Judge, the Id. ADJ had no jurisdiction to entertain the appeal filed by the respondent and thereby, remanding the matter to the Id.Civil Judge as has been done by the impugned order.

8. According to the appellant no appeal lies against an order dismissing an application under Order 1 Rule 10 and Order 22 Rule 3 CPC. It is submitted that such an order is not a decree within the meaning of Section 2(2) CPC and, therefore, no appeal lies under Section 96 r/w Order XLI Rule 1 CPC. It is also

submitted that such an order does not adjudicate upon any right of the parties on merits and therefore, Section 11 CPC is not attracted. It is further submitted that there is a specific provision under Order XXII Rule 9(1) CPC that no fresh suit could be brought on the same cause of action. The only course open to a party is to seek the remedy for setting aside abatement. Of course, an order refusing to set aside abatement is appealable under Order XLIII Rule 1(k) CPC. Even such an order passed cannot be styled as decree within the meaning of Section 2(2) CPC.

9. The appellant has relied upon the following judgments:- (i) Madan Naik (dead by LRs) & Ors. v. Hansubala Devi & Ors., AIR 1983 SC 676;

(ii) Amakka Shiva Narandekar v. Dedubhau Narandekar, (2005) 5 Bom CR 350: 2005 (1) Mh.L.J. 1129;

(iii) Anupama v. Bhagwan Dass & Ors., 111(2004) DLT 143;

(iv) Venkatakrishna Reddi & Ors. v. Krishna Reddi, AIR 1926 Madras 586;

(v) Gautam Bhawan Nirman Sahkari Samiti, Ltd., Jodhpur v. Ramnik Kumari & Ors., AIR 2005

Rajasthan 161;

(vi) Anang Pal v. Pearey Lal & Ors., AIR 1986 Punjab and Haryana 87;

(vii) Ram Charan Das v. Hira Nand, AIR (32) 1945 Lahore 296;

(viii) Babulal v. Jugalkishor & Ors., AIR 1954 Nagpur 254;

(ix) K.Venkata Seshamma v. K Guneswara Rao, 1924 Madras 622;

(x) Baij Nath & Anr. v. Munna Lal, AIR 1963

Allahabad 389;

(xi) Srinivasa Mudaliar v. Abraham Pillai, AIR (37) 1950 Madras 824;

10. It is the submissions of the appellant that the respondent even otherwise had no right to file an appeal without the leave of the court. More so, when the order passed on the application under Order XXII Rule 3 CPC dismissing the same was neither a decree nor a judgment.

11. It is submitted that in view of the aforesaid, the first appellate court had no jurisdiction to entertain the appeal filed by the respondent against the order of the Id. Civil Judge and, therefore, any direction given by the first appellant court is not sustainable in law. Reference has also been made to the following judgments:- (i) Banarsi & Ors. v. Ram Phal, AIR 2003 SC 1989;

(ii) Shivaraya v. Siddamma & Anr., AIR 1963 Mysore 127;

(iii) State of Kerala v. Madhavkurup Ramchandran Pillai, AIR 1999 Kerala 359; and,

(iv) (Gopiseti) Veeraswami & Ors. v. Sagiraju Seetharama Kantayya, AIR 1926 Madras 1089.

12. It is also submitted that once an objection was taken by the appellant with regard to the maintainability of the appeal, the appellate court could not have assumed jurisdiction to hear an appeal without deciding the preliminary objection.

13. On the other hand, the learned counsel appearing for the respondent has submitted that in addition to dismissing an application under Order I Rule 10 CPC and Order XXII Rule 3 CPC, the Id. Civil Judge has simultaneously dismissed the suit of the appellant as abated. It is thus submitted that the order comes within the definition of a decree as per the provisions of Section 2(2) CPC, which defines the decree as,

(2) "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within [3]* * * section 144, but shall not include-

- (a) any adjudication from which an appeal lies as an appeal from an order, or
- (b) any order of dismissal for default.

Explanation-A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit, it may be partly preliminary and partly final;

14. It is thus submitted that in view of the observations made by the Id. Civil Judge while disposing of the entire suit, the decree passed by the Id. Civil Judge became appealable as a regular appeal under Section 96 CPC. Reference has been made to Suppu Nayakan v. Perumal Chetty, AIR 1917 Madras 285, Silla Jagannadha Prasad v. Silla Lalitha Kumari, AIR 1989 AP 8 and 1978 WLN(UC) 52(53).

15. To appreciate the controversies between the parties, it would be appropriate to take note of the impugned order passed by the Id. Civil Judge in this case on 13.04.2007 as also the judgments relied upon by both sides which clarifies the legal position.

16. The appellant had relied upon a judgment of the Apex Court as delivered in the case of Madan Naik (dead by LRs) & Ors. v. Hansubala Devi & Ors. (supra), wherein while dealing with the definition of decree as provided for under Section 2(2) CPC and the right to appeal, if any, in case of dismissal of application for brining on record the legal heirs, has been discussed. The relevant observations made by the Apex Court are reproduced hereunder:-

5. Order 22, Rule 11 of the CPC read with Order 22 Rule 4 makes it obligatory to seek substitution of the heirs and legal representatives of deceased respondent if the right to sue survives. Such substitution has to be sought within the time prescribed by law of limitation. If no such substitution is sought, the appeal will abate. Sub-rule (2) Rule 9 of Order 22 enables the party who is under an obligation to seek substitution to apply for an order to set aside the abatement and if it is proved that he was prevented by any sufficient cause from continuing the suit which would include an appeal, the Court shall set aside the abatement. Now where an application for setting aside an abatement is made, but the Court having

not been satisfied that the party seeking setting aside of abatement was prevented by sufficient cause from continuing the appeal, the Court may decline to set aside the abatement. Then the net result would be that the appeal would stand disposed of as having abated. It may be mentioned that no specific order for abatement of a proceeding under one or the other provision of Order 22 is envisaged, the abatement takes place on its own force by passage of time. In fact, a specific order is necessary under Order 22 Rule 9, C. P. C. for setting aside the abatement.

8. Section 2 Sub-section (2) of the CPC defines 'decree' to mean "the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to allow any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 144 but shall not include any adjudication from which an appeal lies as an appeal from an order." When an appeal abates for want of substitution as envisaged by Sub-rule 1 of Rule 9 of Order 22, it precludes a fresh suit being brought on the same cause of action. It is a specific provision. If abatement implied adjudication on merits, Section 11 of C.P.C. would be attracted. Abatement of an appeal does not imply adjudication on merits and hence a specific provision had to be made in Order 22 Rule 9(1) that no fresh suit could be brought on the same cause of action. Therefore when the appeal abated there was no decree, disposing of the first appeal, only course open is to move the court for setting aside abatement. An order under Order 22 Rule 9(2) C.P.C. refusing to set aside abatement is specifically appealable under Order 43 Rule 1(k). Such an adjudication if it can be so styled would not be a decree as defined in Section 2(2) C.P.C. Section 100 provides for second appeal to the High Court from every decree passed in appeal by any Court

subordinate to the High Court on the grounds therein set out. What is worthy of notice is that a second appeal lies against a decree passed in appeal. An order under Order 22 Rule 9 appealable as an order would not be a decree and therefore, no second appeal would lie against that order. Such an appeal is liable to be rejected as incompetent.

17. On the strength of the aforesaid judgment, it is submitted that in this matter the order of the Id. Civil Judge in having dismissed the application under Order XXII Rule 3 CPC r/w Order I Rule 10 CPC and in having refused to allow the respondent to be impleaded as party to the suit and thereafter, making a passing reference that the suit stands abated not a decree which becomes appealable as it was not an order refusing to set aside the abatement under Order XL Rule 1(k) CPC.

18. In the case of Amakka Shiva Narandekar (supra) in a similar situation, the Bombay High Court has observed that appeal is maintainable only against an order refusing to set aside the abatement or dismissal of suit. Since against an order deciding that 'J' was not legal representative of deceased and therefore the suit was abated no application has been moved for setting aside the abatement, Order XXII Rule 9 would not come into play. As there is no application for setting aside abatement, there cannot be any refusal to do so. Order passed

would not be appealable under Order XLIII Rule 1(k) CPC. The relevant paragraph is reproduced hereunder:-

6. Sub-rule (2), therefore, stipulates that a person who claims to be the legal representative of the deceased plaintiff or assignee, may apply to the Court to set aside the abatement or dismissal. The Court may set aside the abatement and dismissal of the suit on such terms as it thinks fit if it is found that the party was prevented by sufficient cause from continuing with the suit. Under Order 43 Rule 1(k), it is only if an order under Rule 9 of Order 22, refusing to set aside the abatement or dismissal of the suit is passed that an appeal is maintainable. A perusal of the impugned order indicates that there is no application made for setting aside the abatement of the suit. Instead, what has been done after Amakka expired on 19.6.1984, the appellant-Jaipal filed an application within time before the appellate Court for substituting his name as the legal representative of Amakka. He claimed his status on the basis of a will left behind by Amakka on 20.8.1979. The trial Court had referred the issue as to the validity of the will and for recording the findings as to who was the legal representative of Amakka. The trial Court had by a detailed order, held that Jaipal was not the legal

representative. These findings of the trial Court arrived at on a reference made to it under Order 22 Rule 5 were accepted by the appellate Court who declared that Amakka could not be represented by Jaipal. It was also held that the appeal had abated as the appellant had died.

19. A full Bench of Madras High Court in the case of Venkatakrishna Reddi (supra) has taken a similar view that no appeal lies against an order refusing the application of a person to be brought on record as the legal representative of a deceased plaintiff on the objection of the defendant even when there is no rival claimant for being brought on the record as his legal representative. Same is the view taken by the Rajasthan High Court in the case of Gautam Bhawan Nirman Sahkari Samiti Ltd. (supra).

20. In the case of Ram Charan Das (supra) a Full Bench of Lahore High Court has observed that the decision of the trial judge as to the alleged legal representative not having been proved to be the legal representative of the deceased party is not open to appeal. From the mere observation by the Judge in a casual manner, that the right to sue did not survive after the death of the deceased party, the Judge should not be deemed to have passed an order abating the suit from which an appeal may be maintained as an appeal from a decree. It having already been decided by the Judge that the alleged legal representative was not the legal representative of the deceased he could not, so long as the order stood, claim a right to appeal from the order of abatement as a legal representative of the original party.

21. The other judgments relied upon by the appellant also supports the contention that when an application under Order XXII Rule 3 CPC is dismissed declining the applicant to be taken as a legal representative and the suit stands abated in the absence of any other person to continue with the suit, an appeal would not lie against the order dismissing an application under Order XXII Rule 3 CPC.

22. The judgments cited on behalf of the respondent i.e. Suppu Nayakan v. Perumal Chetty (supra), Silla Jagannadha Prasad v. Silla Lalitha Kumari (supra) and 1978 WLN(UC) 52(53) (supra) are distinguishable in the light of the judgments delivered by the Apex Court and other courts as quoted above. Hence, are of no

help to the case of the respondent.

23. In view of the aforesaid legal position, it is apparent that no appeal was maintainable against the order of the Id. Civil Judge. The entertainment of the appeal by the Id. ADJ against the order of the Id. Civil Judge was not in accordance with law. Thus, remanding back the matter to the Id. Civil Judge by the Id. ADJ cannot be sustained. The impugned order is therefore set aside. Accordingly, the appeal is allowed with no orders as to costs. It is made clear that nothing stated herein would prevent the respondent to take recourse to other legal remedies as may be available to him and nothing stated herein would cast any aspersions on the merits of the case. TCR be sent back forthwith along with a copy of this order

CM No. 18329/2010

Interim orders are made absolute.

Application stands disposed of.

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