

Dondapani Sahu

Vs

Arjuna Panda and Others

Civil Appeal No. 433 of 1966

(A.N. Grover, JJ)

07.03.1969

JUDGMENT

GROVER, J. -

1. This is a plaintiff's appeal by special leave from a judgment of the Orissa High Court dismissing a suit for recovery of of possession" of lands described in the schedule attached to the plaint and for mesne profits on the ground of abatement.

2. The plaintiff had impleaded nine defendants. Defendants 1 to 4 were members of a joint Hindu family' defendant No. 1 being the father of defendant Nos. 2 to 4. Out of them defendant No. 4 did not appear and contest the suit. Defendant Nos. 1 to 3 claimed to be the owners of properties shown in Lot 1 in the schedule. Defendant Nos. 5 and 6 claimed one item out of Lot I. Defendant No. 9 claimed the properties in Lots 2 and 3 in the schedule. Defendant Nos. 7 and 8 ultimately entered into a compromise. During the pendency of the suit the 4th defendant died on June 25, 1958. On August 25, 1958 the plaintiff filed a memorandum in the following terms :

"Defendants 1 to 4 are members of a joint family. The 1st defendant is the father and defendants 2 to 4 are his sons.

"Defendant No. 4 Kasinath Panda died and defendants 1 to 3 are his L. Rs."

An application was filed on August 26, 1958 that Kasinath Panda defendant No. 4 who had died left two minor sons Surendra Panda and Janannath Panda and a widow Dossi Pandiani who were all members of a joint Hindu Family along with defendants 1 to 3. It was stated that as these legal representatives had not trespassed on the suit lands it was not necessary to implead them in the suit. Defendant Nos. 1 to 3 were the legal representatives who were already on the record. It was further averred that the provisions of the Hindu Succession Act did not apply and the suit could proceed in the absence of the widow and the minor sons of the deceased. The trial Judge passed an order striking off the name of defendant No. 4 on August 26, 1958. Defendant No. 1 also died on October 1, 1958. Defendant Nos. 2 and 3 filed a memorandum that they were his legal representatives. His name was consequently struck off. After framing the necessary issues and recording the evidence of the parties the Trial Judge believed the version of the plaintiff that the defendants had trespassed upon the suit lands and decreed the suit on May 5, 1959 against defendants 2, 3, 5 and 9 and dismissed the suit as against defendants 7 and 8 owing to a compromise having been entered into by them.

3. The contesting defendant preferred an appeal to the Additional Subordinate Judge in which one

of the contentions raised was that the suit had abated as the legal representatives of the 4th defendant had not been impleaded in his place. This contention was negated on the ground that the suit was for recovery of possession from the trespassers had died during the pendency of the suit, the plaintiff could be granted relief against the remaining trespassers. On the merits also the learned Additional Subordinate Judge affirmed the decision of the trial Judge.

4. The unsuccessful defendant Nos. 2, 3, 6 and 9 filed an appeal to the High Court. The sole point on which the appeal succeeded was of abatement of the suit owing to the death of defendant No. 4 and the non-impleadment of his legal representatives, namely, his widow and two minor sons. The view of the High Court was that where a suit was based upon a joint and indivisible act of trespassers there was no question of several liability. On the cause of action a joint and indivisible decree would follow and if the decree was a nullity as against one defendant it must be taken to be a nullity against all the defendants. Moreover it was essential under the law to join all the trespassers known to be in possession on the date of the suit as necessary parties. The argument that there would be no total abatement because the suit property was in three lots was not accepted.

5. With all respect due to the learned Judges of the High Court it is not possible to appreciate how the suit could be dismissed when defendant No. 4 was the son of defendant No. 1 and brother of defendant Nos. 2 and 3 and they constituted a joint Hindu family. Even if the widow and the sons of defendant No. 4 were not impleaded although their names were disclosed on the ground that defendants Nos. 1 to 3 represented defendant No. 4, the suit could not be dismissed for reasons which are quite obvious. Order XXII, Rule 5 provides that where a question arises as to whether any person is or is not a legal representative of deceased plaintiff or deceased defendant such question shall be determined by the court. As has been stated earlier, the plaintiff had made it quite clear that defendant No. 4 had left a widow and two minor sons whose names had been given in the application which was filed but since he was a member of the joint Hindu family he was represented by defendants Nos. 1 to 3 who were already on the record. No objection whatsoever was taken by the aforesaid defendants or any other defendant at that time to this averment. When the Trial Judge struck off the name of defendant No. 4 he accepted the position adopted by the plaintiff that defendants Nos. 1 to 3 were the legal representatives of defendant No. 4 for the purpose of the suit. As pointed out in Mulla's Civil Procedure Code, Vol. II at p. 1258 if the defendants have not objected in the suit that a deceased co-defendant is not properly represented they will not be entitled to raise that objection in the appeal. In the present case it can well be said that it was almost by consent of the parties that the name of defendant No. 4 was struck off without impleading his widow and his two sons on the ground that the deceased was represented by defendant Nos. 1 to 3 who were already parties to the suit. It was not open to the defendants to have the matter reopened in an appeal.

6. We would, therefore, allow this appeal and set aside the judgment of the High Court holding that the suit had abated. The matter will now go back to the High Court for decision of the appeal on the merits. The costs shall abide the event.

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