

Upper India Cable Co. and Others

Vs

Bal Kishan

Civil Appeal No. 1035 of 1979

(D. A. Desai, V. B. Eradi JJ)

07.03.1984

JUDGMENT

DESAI, J. -

1. The respondent-L. Balakrishnan filed Original Suit No. 1010 of 1967 in the Court of Second Additional Munsif, Agra against a firm styled as " The Upper India Cables Ltd. and Ors." and its partners constituting the firm at the relevant time for eviction from the premises occupied by the firm as a tenant on the ground that the tenant has impaired the value and utility of the demised premises. The suit was resisted by the defendants - present appellants.
2. The suit for eviction was dismissed by the trial Court. The respondent-landlord preferred Civil Appeal No. 234 of 1970 in the Court of II Additional Civil Judge, Agra. The appeal of the landlord succeeded and a decree for eviction was made. There was also a decree for mesne profits and cost.
3. The firm and the partners filed Second Appeal No. 1017 of 1971 in the High Court of Judicature at Allahabad.
4. When the appeal was pending two of the partners Shyam Lal and Gulab Chand died. This fact came to the notice of the High Court when the appeal was taken up for hearing. The High Court posed to itself the only question whether the appeal abated because the heirs and legal representatives of the two deceased partners were not substituted within the prescribed period of limitation. It may as well be mentioned that an application for bringing the heirs and legal representatives of the deceased partners was admittedly never moved. The High Court held that as the suit was instituted against the firm and its partners and as the first appellate Court has decreed the suit against both of them, the decree of eviction against the two of the deceased partners has become final and in order to avoid two conflicting decrees being passed in respect of the causes of action the appeal abated as a whole. It is this part of the order and judgment of the High Court which is questioned in this appeal.
5. In the plaint para 1, the following averments are made. These averments being material to the disposal of the appeal, they may be extracted :

That the defendant firm was in occupation of property No. 2191 which is an open piece of land situated in Mohalla Khirki Kaley khan, Moti Katara, Agra as a tenant on behalf of the plaintiff on a monthly rent of Rs. 10 only. The tenancy commenced from the first day of every English calendar month. Though the defendant Ram Narain usually dealt with the plaintiff on behalf of the firm, but it is claimed by the

defendants that they are partners of the firm hence they are also impleaded as proper parties to avoid controversy.

6. This averment was not controverted and during the course of the learning today it is neither disputed nor denied. This aspect goes to the root of the matter because this Court has now to decide whether the order of the High Court disposing of the second appeal preferred by the present appellants as having abated as the appellants failed to implead heirs and legal representative of the two partners who were merely found as proper parties who died pending the appeal, is sustainable.

7. Averments in the plaint unmistakably show that the plaintiff- landlord unequivocally treated the firm as the tenant. The suit for eviction was filed against the firm but as other defendants claimed to be the partners of the firms, they are impleaded by the plaintiff as proper parties. It was open to him not to implead the partners of the firm in view of the provision contained in Order XXX, Rule 1 of the CPC which permits a firm to be sued in the firm's name. Undoubtedly, if a requisition is received to disclose who are the partners, the same has always to be complied with. The plaintiff chose to sue the firm and joined partners as proper parties. The material averment in the plaint is that firm is the tenant.

8. Now the question is where the suit is instituted against the firm and partners are impleaded as proper parties, in event of death of a partner so sued, would the suit or appeal, as the case may be, abate if heirs and legal representatives of the deceased partner are not substituted within the prescribed period of limitation. There is a two-fold answer to this question. Order XXX, Rule 4 provides that notwithstanding anything contained in Section 45 of the Indian Contract Act, 1872 where two or more persons are sued in the name of the firm under the enabling provisions of Order XXX, and any such person dies whether before the institution of the suit or during the pendency of any suit, it shall not be necessary to join the legal representatives of the deceased as a party to the suit. Secondly death of a proper party would have no impact on the suit more so where on death of a partner the partnership may stand dissolved or heirs do not desire to join the firm. Both these aspects were overlooked by the High Court.

9. Turning to the facts of this case, we are concerned with the suit as it was framed and instituted. In the suit for eviction firm was impleaded as the tenant and the deceased partners were impleaded as merely proper parties which would tantamount to making them in their personal capacity. The decree for eviction would operate against the firm according to the plaintiff himself because the firm was the tenant.

10. Therefore, we posed a question to the learned counsel for the respondent whether on the death of a proper party whose heirs and legal representatives are not substituted and when no relief was claimed against such a party would the suit or appeal abate more so when the parties against whom relief is claimed is very much there and is prosecuting its appeal. Learned counsel for the respondent had no specific reply to this question except saying that " if the firm is abolished and some new firm is created the plaintiff may not take any notice of it ". We are at a loss to understand " abolition are creation of firms ".

11. The position boils down to this that two of the partners who were appellants along with the firm in the second appeal before the High Court died pending the appeal. It is nobody's case that the heirs and legal representatives of the deceased partners joined the firm or they were entitled to be taken in as partners in place of the deceased partners as partners in the firm. Therefore, the question to be answered is whether on the death of two of the proper or formal parties impleaded in their capacity

as partners by the plaintiff along with the firm, in absence of substitution of heirs and legal representatives the appeal abates ? The answer is in the negative. Therefore, the question of substituting heirs and legal representatives of the two proper formal parties does not arise and the death has no impact on the proceeding. The appeal cannot abate. Therefore, the High Court was in error in disposing of the appeal as having abated.

12. Accordingly, this appeal succeeds and is allowed. The order of the High Court disposing of the appeal as having abated is quashed and set aside and the matter is remitted to the High Court for disposal of the second appeal on merits according to law. The respondent shall pay the cost of hearing to the appellant.

</html