

Custodian of Branches of Banco National Ultramarino

Vs

Nalini Bai Naique

Civil Appeals Nos. 1154-1155 (N) of 1974

(K. N. Singh, K. N. Saikia JJ)

28.04.1989

JUDGMENT

SINGH, J. –

1. This appeal is directed against the judgment and order of the Judicial Commissioner, Goa dated June 30, 1972 setting aside the order of the Civil Judge, Senior Division, Panaji and declaring that the suit instituted by the appellant had abated.
2. The appellant Bank instituted a suit before the Civil Judge for recovery of an amount of Rs. 63,315 against Vinaique Naique, advanced to him as loan by it. Vinaique Naique, the defendant contested the suit, issues were framed and evidence was being recorded. On February 26, 1970 statement of PW 1 was recorded and the case was adjourned to another date but on that date also the case was adjourned to July 23, 1970. The suit was again adjourned on July 23, 1970 on the ground that the defendant Vinaique was indisposed and was hospitalised. Therefore, the suit was taken up for hearing on November 4, 1970. On that day the defendant's pleader informed the court orally that the defendant had died at Margaon but did not give any further details. The Custodian of the appellant Bank Panaji deputed his clerk to Margaon to collect necessary information and to obtain death certificates from the Civil Registration Office if the defendant was found to be dead. The clerk visited Margaon on November 5 and 6, 1970 and on enquiry he came to know that the defendant had died on August 4, 1970, he obtained death certificate from the Civil Registration Office on August 6, 1970 and handed over the same to the Custodian of the Bank on November 7, 1970. Since November 8, 1970 was Sunday, the Custodian could not file the same in the court. The appellant made application under Order XXII Rule 4 of CPC on November 9, 1970 for bringing on record Smt. Nalini Bai Naique as the legal representative of the deceased original defendant. He made another application for condoning delay in making the application duly supported by affidavit. The appellant made another application requesting the court to treat his earlier application made for condonation of delay as an application under Order XXII Rule 9 for setting aside the abatement of the suit. Smt. Nalini Bai Naique late defendant's widow contested the application on the ground that the news regarding the death of Vinaique had been published in the local newspapers and the plaintiff had knowledge of his death and further the suit had abated on the expiry period of 30/60 days of the death of original defendant as no application for setting aside abatement had been filed within time. Meanwhile, the appellant made another application for adding the names of six heirs : four sons one major son and three minor sons and two minor daughters of the deceased defendant Vinaique Naique on the ground that earlier the appellant had no knowledge about the sons and daughters of the deceased defendant. On behalf of Mrs. Nalini Bai it was vehemently asserted before the trial court that the application for substitution was not maintainable as it was filed beyond time, and in the alternative she was not the legal heir of the deceased defendant but she was only his

(Meeira) and as other legal heirs of the deceased defendant were not brought on record within time the application for bringing the sons and daughters on record was liable to be rejected. The trial Judge on an elaborate consideration of the rival contentions held that even though the news relating to the death of original defendant Vinaique Naique had been reported in local newspapers but in view of the affidavit of Custodian and other material on record the appellant Bank came to know of the death of the defendant only on November 4, 1970 from the deceased defendant's lawyer in the court and within four days thereof application for bringing the legal representative of the deceased defendant was made, therefore, the application made under Order XXII Rule 4 was not barred by time. The learned Judge further held that since Smt. Nalini Bai Naique one of the legal representative of the deceased defendant was brought on record within time, the sons and daughters could also be impleaded as defendant along with her. On these findings the learned Judge by his order dated November 16, 1971 set aside the abatement of the suit directed for substituting the name of the widow Smt. Nalini Bai Naique along with the name of four sons and two daughters as defendants to the suit in place of deceased defendant Vinaique. Mrs. Nalini Bai filed a revision application under Section 115 of Code Procedure before the Judicial Commissioner of Goa at Panaji against the aforesaid order of the trial Judge. The Judicial Commissioner by his order dated June 30, 1972 set aside the order of the trial Judge and declared the suit to have abated. Aggrieved the plaintiff Bank has referred this appeal after obtaining special leave.

3. The learned Judicial Commissioner interfered with the order of the trial Judge on the sole ground that Mrs. Nalini Bai whose name was proposed to be brought on record was not legal representative of the deceased Vinaique Naique as under the Portuguese Law she being the widow had acquired Meeira rights and her status was not that of "Cabeca De Casal" (head of the family and administrator) of the other heirs of deceased Vinaique Naique. Since all the heirs of the deceased defendant had not been brought on record along with Mrs. Nalini Bai within time the suit abated as Mrs. Nalini Bai alone could not represent the estate of deceased defendant. The learned Judicial Commissioner did not interfere with other findings recorded by the trial Judge, instead he set aside the order of the trial Judge on the sole ground as aforesaid and declared the suit to have abated.

4. After hearing learned counsel for the parties, we are of opinion that the learned Judicial Commissioner committed serious error of law in setting aside the order of the trial Judge. "Legal representative" as defined in Civil Procedure Code which was admittedly applicable to the proceedings in the suit, means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued. The definition is inclusive in character and its scope is wide it is not confined to legal heirs only instead it stipulates a person who may or may not be heir, competent to inherit the property of the deceased but he should represent the estate of the deceased person. It includes heirs as well as persons who represent the estate even without title either as executors or administrators in possession of the estate of the deceased. All such persons would be covered by the expression "legal representative". If there are many heirs those in possession bona fide, without there being any fraud or collusion, are also entitled to represent the estate of the deceased. In the instant case it not disputed that under the Portuguese Law of Inheritance which was applicable to Goa at the relevant time Mrs. Nalini Bai had acquired "Meeira rights" according to which she had acquired half share in the estate left by the deceased Vinaique Naique and the remaining half share was inherited by sons and daughters of the deceased who were subsequently brought on record. On the admitted facts Mrs. Nalini Bai therefore represented the estate of the deceased Vinaique Naique. Once the name of Mrs. Nalini Bai was brought on record within time and application for setting aside abatement was allowed by the trial Judge, the suit could proceed on merits and the mere fact that the remaining

legal representatives were brought on record at a subsequent stage could not render the suit defective. The Custodian of the appellant Bank had no knowledge that there were other legal representatives of deceased defendant along with Mrs. Nalini Bai. He had filed affidavit that one making diligent and bona fide inquiry, he had come to know that Nalini Bai was the sole legal representative but later on the acquired knowledge that the deceased had left four sons and two daughters as legal representatives along with Mrs. Nalini Bai, therefore, he made another application for bringing them on record. The trial Judge accepted the testimony of the Custodian, and placing reliance on the decision of Andhra Pradesh High Court in Mannem Venkataramayyah v. M. Munnemma (AIR 1963 AP 406 : (1963) 1 Andh WR 338) he allowed the substitution application. The trial court committed no error in law, instead he applied correct principles of law.

5. In *Daya Ram v. Shyam Sundari* ((1965) 1 SCR 231 : AIR 1965 SC 1049), this Court recognised the principle of representation of the estate by some heirs, where the defendant during the pendency of the suit to enforce claim against him and all the heirs are not brought on record within time. This Court held that if after bona fide inquiry some but not all the heirs of a deceased defendant, are brought on record the heirs so brought on record represent the entire estate of the deceased and the decision of the court in the absence of fraud or collusion binds even those who are not brought on record as well as those who are impleaded as legal representatives of the deceased defendant. In *N. K. Mohd. Sulaiman v. N. C. Mohd Ismail* ((1966) 1 SCR 937 : AIR 1966 SC 792), this Court rejected the contention that in suit to enforce a mortgage instituted after the death of a Muslim, if all the heirs of the deceased were not impleaded in the suit and a decree was obtained and in execution the property was sold, the auction purchaser could have title only to the extent of the interest of the heirs who were impleaded, and he could have no title to the interest of those heirs who had not been impleaded to the suit. The court held, that those who were impleaded as party to the suit in place of the deceased defendant represented the entire estates as they had share in the property and since they had been brought on record the decree was binding on the entire estate.

6. In the instant case Mrs. Nalini Bai had admittedly half share in the property left by the deceased defendant and as she was brought on record within time, she represented the estate of the deceased defendant and the suit could proceed on merits. In this view the impleadment of other legal representatives at a subsequent stage could not affect validity of the proceedings. In the result we allow the appeal and set aside the judgment and order of the Judicial Commissioner dated June 30, 1972, and restore the order of the trial Judge. Since trial of the suit has been delayed we direct the trial court to make every effort to decide the suit expeditiously. The appellants is entitled to its costs throughout.

Civil Appeal No. 1155(N) of 1974 - The reasons which we have given for allowing the appeal in C.A. No. 1154(N) of 1974 squarely apply to the facts of the present case and the appeal is therefore allowed. The appellant is entitled to its costs throughout.

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