

Bhola Nath Misra

Vs

Rajendra Pandey and Another

Civil Appeal No. 1606 of 1980

(S. Saghir Ahmed, K. Ramaswamy JJ)

20.02.1997

ORDER

1. This appeal by special leave arises from the judgment of the learned Single Judge of the Allahabad High Court, made on 21-4-1978 confirming the decree of the trial court and appellate court granting a perpetual injunction against the appellant and the second defendant restraining them from making any construction on the land in dispute, as shown in the map annexed to the plaint and also mandatory injunction to demolish the construction insofar as it relates to the construction on such land. The second defendant remained ex parte in the trial court and the decree as against him had become final. The appellant/first defendant carried the matter in appeal which was confirmed and the second appeal was filed. The counsel appearing for the appellant made a statement on 6-12-1976 that he was not seeking any relief against the second defendant and the decree as against the second defendant having become final, he was not proposing to take out any service of notice on the second defendant. As a result, the court noted on that date that "the effect thereof should be brought to the notice of the court" when the appeal was to be heard on merits. Consequently, when the matter had come up for hearing on merits, the learned Judge proceeded on the premise that the decree as against the second defendant being joint and inseparable, the same had become final, as against the second defendant; it was abated and so it would not be proper to go into the merits in the matter. As a consequence, the appeal also was dismissed without going into the merits, as contended by the appellant. Thus, this appeal.

2. Palpably, the view taken by the High Court is not correct. The question of abatement of the appeal does not arise because this is not a case of any of the parties expiring pending proceedings followed by omission to bring the legal representatives on record. In that situation only, the appeal gets abated. But when the decree as against one of the defendants has become final and is either not contested or is not carried in appeal, the a decree becomes enforceable as against the defendant who suffers the decree. But when one of the defendants contests the correctness of the decree, necessarily, it has to be examined whether the finding recorded and the decree passed by the trial court, as affirmed by the appellate court, is correct in law. But, unfortunately, the High Court has not gone into the question. The only course then open is remittance of the matter for consideration by the High Court on merits. Unfortunately, this Court has dispensed with the printing and directed the appeal to be heard on the basis of the material placed in the SLP paper-boak. The appellant has not placed on record the judgment and decree of either the trial court or the appellate court. Under these circumstances, we are not in a position to know what were the reasons given by the trial court and as affirmed by the appellate court in granting the decree against the appellant. Under these circumstances, we think that no useful purpose would be served in remitting the matter after two decades.

3. The appeal is, accordingly, dismissed. No costs.