

SUPREME COURT OF INDIA

Shankar Lal

Vs.

Sakil Ahmed

(V.N. Khare and S.N. Variava JJ.)

25.07.2000

ORDER

1. This appeal is at the instance of defendant No. 1. The plaintiffs-respondents herein filed a suit for possession against defendant Nos. 1 & 2. Defendant No. 1 filed a written statement wherein it was stated that he and defendant No. 2 are the owners in possession of the land for the last twenty years. Defendant No. 2 put in appearance through Counsel. However, he did not file any written statement. During the trial of the suit, defendant No. 2, Poonam Chand, died on 1.3.1974 leaving behind four sons, namely, Lal Chand, Bhura Ram Nem Chand and Prabhu Dayal as his heirs. However, this fact was not brought to the notice of the trial court either by the plaintiffs or by the defendants. The trial court decreed the suit of plaintiffs-respondents. Defendant No. 1 preferred an appeal before the first Appellate Court and in the grounds of appeal, one of the objections taken was that in view of the fact that defendant No. 2, Poonam Chand, who died on 1.3.1974 having not been substituted by his heirs, the suit had abated. The first Appellate Court was of the view that in view of the Order XXII Sub-rule 4 of Rule 4 of CPC, the suit had not abated. Consequently, the appeal was dismissed. Defendant No. 1 thereafter, filed second appeal before the High Court but the same was also dismissed. It is against the said judgment, defendant No. 1 is in appeal before us.

2. Learned Counsel for the appellant urged that in the absence of substitution of defendant No. 2 by his heirs the suit had abated and the decree passed by the Court below is nullity. Learned Counsel also urged that Sub-rule 4 of Rule 4 of Order XXII was inserted to CPC by Amendment Act 104 of 1976 which came into force with effect from 1st February, 1977 has no retrospective application, therefore, the suit filed by the plaintiffs had abated. Learned Counsel appearing for the plaintiffs-respondents argued that defendant No. 1 having participated in the proceedings before the trial court without any kind of objection, it is no longer open to him to raise the plea that suit had abated in the absence of substitution of deceased defendant No. 2.

3. It is not disputed that defendant No. 2, Poonam Chand, died on 1.3. 1974 leaving behind four adult sons. It is also not in dispute that the plaintiffs did not apply for substitution of defendant No. 2 either in the trial court or before the first Appellate Court. The question, therefore, arises whether under such circumstances, the plaintiffs can take benefit of Sub-rule (4) of Rule 4 of Order XXII. Sub-rule (4) of Rule 4 was brought on the Statute book by Act No. 104/76 with effect from 1.2.1977, which reads thus ;

(4) The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place.

4. Admittedly when defendant No. 2 died, the said provision was not on the Statute book. It is also not in dispute that the amended provision of Order XXII, Sub-rule (4) of Rule 4 had no retrospective effect. Under the provisions as existed then, plaintiffs were required to substitute defendant No. 2 failing which suit was to abate under Rule 3 of Order 22 CPC. We are, therefore, of the view that plaintiffs cannot derive any benefit out of amended Sub-rule 4 of Rule 4 of Order XXII CPC, as it was not in existence then.

5. Coming to the next question suffice it to say that under the provisions of CPC as they existed at the relevant date, it was for the plaintiff to have taken steps for substitution of defendant No. 2 and in the absence of such steps suit was to abate. Merely because defendant No. 1 participated in the proceedings before the trial court without any kind of objection, it does not mean that defendant had disentitled himself to raise the plea before the first Appellate Court. In fact, non-raising of objection before the trial court would not amount to waiver or acquiescence or condonation of default committed by the plaintiffs. Since the plaintiffs had not taken any steps for substitution of defendant No. 2 the suit had abated under Order XXII, Rule 3.

6. For the aforesaid reasons, we are of the view that this appeal deserves to succeed. We, accordingly, set aside the decree of the trial court as affirmed by the High Court. The appeal is allowed. Suit No. 49/73 shall be treated as having abated. There shall be no order as to costs.