SUPREME COURT OF INDIA

Budh Ram

Vs.

Bansi

C.A.No…of 2010

(P.Sathasivam and Dr.B.S.Chauhan JJ.)

05.08.2010

JUDGEMENT

Dr.B.S.Chauhan, J.

1. Leave granted.

2. This appeal has been preferred against the Judgment and Order dated 30.11.2007 in FAO No. 345 of 2003 of the High Court of Himachal Pradesh at Simla by which it has upheld the Judgment and order of the 1st Appellate Court i.e. the Additional District Judge, Solan Camp, Nalagarh in Case No. 19-NL/13 of 2000, whereby the Appellate Court refused to condone the delay in filing the application for substitution of Legal Representatives (hereinafter called the LRs.) of the deceased respondent No.4, Smt. (Parwatu) and held that the appeal filed by the present appellants stood abated in toto.

3. The facts and circumstances giving rise to the present case are that the respondents, namely, Tulsi, Bansi and Hariya, all sons of Daulatia, instituted Civil Suit No. 207/1 of 1994 against the present appellants and some of their predecessors-in-interest alongwith Smt.

> "Parwatu, widow of Nanta, a proforma defendant, for seeking declaration to the effect that plaintiffs/respondents were co-owners and co-sharers in joint possession to the extent of 17 Bighas, 8 Biswas and Smt. Parwatu, proforma defendant No. 6 was co-owner and co-sharer in joint possession to the extent of 5 Bighas, 15 biswas comprised in Khewat/Khatuni Nos. 15-16, Kitats - 32, total measuring 49 Bighas, Biswa situated in Village Malag, H.B. 277, Pargana Nawan Nagar, Tehsil Nalagarh, District Solan (H.P.) with the consequential relief of permanent prohibitory injunction restraining the appellants/ defendant Nos. 1 to 5 from causing ouster and decree for joint possession."

4. The suit was contested by the present appellants. However, defendant No. 6, Smt. Parwatu did not enter appearance and did not contest the suit. The present appellants had also claimed

title over the suit land by way of adverse possession. It is an admitted fact that both the parties are descendants of the same ancestor Jalphu and certain mutation proceedings had been under challenge in the suit itself. On the basis of the pleadings, issues were framed and evidence was adduced. After the conclusion of the trial of the suit, the Trial Court decreed the suit in favour of the plaintiffs/respondents and defendant No. 6, as prayed for vide Judgment and decree dated 21.12.1999.

5. Being aggrieved, the present appellants preferred Civil Appeal No. 19-NL/13 of 2000, wherein the said defendant No. 6 Smt.

> "Parwatu was impleaded as respondent No. 4. The appeal was contested by the respondents/plaintiffs, however, Smt Parwatu remained unrepresented before the 1st Appellate Court also. During the pendency of the appeal, Smt. Parwatu, respondent No. 4, died on 19.11.2000. The present appellants preferred an application for substitution of the LRs of Smt. Parwatu, respondent No. 4, before the Ist Appellate Court on 16.10.2001, under order XXII Rule 4 of the Code of Civil Procedure, 1908 (hereinafter called as, "CPC"). The said application was duly supported by an affidavit, however, no application for condonation of delay was filed along with the said application. It was after an inordinate delay that an application for condonation of delay was filed on 15.11.2002 without furnishing any explanation as to why the application could not be filed along with the application for substitution of LRs."

6. The said application was contested by the respondents/plaintiffs taking a specific plea that the appellants/ applicants were fully aware of the death of Smt. Parwatu as they were residing in same village. The present appellants/applicants had taken part in the last rites of the deceased Smt. Parwatu. Thus, the respondents sought for rejection of the said application.

7. The Appellate Court considered various aspects and issues involved and reached the conclusion that there was no sufficient cause for the appellants/applicants to file an application with such an inordinate delay and, therefore, the application for condonation of delay was rejected. The Appellate Court further came to the conclusion that in view of the fact that there was a joint possession and co-ownership of the respondents/plaintiffs and Smt. Parwatu, and as the Trial Court had passed a joint decree in their favour, the appeal stood abated in toto.

8. Being aggrieved and dissatisfied, the appellants preferred the FAO before the High Court which has been dismissed by the impugned Judgment and order dated 30.11.2007. Hence, this appeal.

9. Sh. Rishi Malhotra, learned counsel appearing for the appellants, has urged a sole point before us that the facts of the case did not warrant abatement of the appeal as a whole. Share of Smt.

> "Parwatu stood well defined and was restricted only to 5 Bighas, 15 Biswas only, thus, appeal could abate only qua her. The courts below erred in observing that the appeal stood abated as a whole as the decree passed by the Trial Court was severable and separable so far as Smt. Parwatu was concerned. Therefore, the appeal deserves to be allowed."

10. On the contrary, Sh. Rajesh Srivastava, learned counsel appearing for the respondents, has vehemently opposed the appeal, contending that the High Court as well as the 1st Appellate Court based their judgments on the correct interpretation and application of law. No fault can be found with the said Judgments, as there was no partition between the parties. The appeal is liable to be dismissed.

11. We have considered the rival submissions made by the learned counsel for the parties and perused the record.

12. Abatement takes place automatically by application of law without any order of the court. Setting aside of abatement can be sought once the suit stands abated. Abatement in fact results in denial to hearing of the case on merits. Order XXII Rule 1 CPC deals with the question of abatement on the death of the plaintiff or of the defendant in a Civil Suit. Order XXII Rule 2 relates to procedure where one of the several plaintiffs or the defendants die and the right to sue survives. Order XXII Rule 3 CPC deals with procedure in case of death of one of the several plaintiffs or of the sole plaintiff. Order XXII Rule 4 CPC, however, deals with procedure in case of death of one of the several defendants or of the sole defendants. Sub-clause (3) of Rule 4 makes it crystal clear that where within the time limited by law, no application is made under sub-Rule 1, the suit shall abate as against the deceased defendant.

13. Provisions of Order XXII Rule 4 (4) CPC, provide that in case, the deceased defendant did not contest the suit and did not file a counter affidavit, the substitution may not be warranted. In the instant case, the High Court repelled the submission regarding application of Order XXII Rule 4(4) CPC on the ground that the said provision requires the presentation of an application before the Court, before it pronounces its judgment for seeking such a relief and once such an application is allowed, in that case, it can only be taken against the said defendant notwithstanding the death of such defendant and such a decree shall have the same force and effect as if it was pronounced before the death had taken place. This view stands fortified by the.

14. Thus, it has rightly been held by the High Court that the provisions of Order XXII Rule 4(4) CPC were not attracted in the facts of this case interpreting the provisions of Order XXII Rule 4(3) CPC read with Rule 11 thereof, this Court observed that an appeal abates as against the deceased respondents where within the time limited by law no application is made to bring his heirs or legal representatives on record. However, whether the appeal stands abated against the other respondents also, would depend upon the facts of a case.

15. This Court held that in case one of the respondents dies and the application for substitution of his heirs or legal representatives is not filed within the limitation prescribed by law, the appeal may abate as a whole in certain circumstances and one of them could be that when the success of the appeal may lead to the courts coming to a decision which may be in conflict with the decision between the appellant and the deceased respondent and, therefore, it will lead to the court passing a decree which may be contradictory and inconsistent to the decree which had become final with respect to the same subject matter between the appellant and the deceased respondent in the same case.

16. *Gupta & Anr.*[3] this Court examined the same issue in a case of dissolution of a partnership firm and accounts and placed reliance upon two judgments referred to immediately hereinabove and held as under:

> "16. .....The courts will not proceed with an appeal (a) when the success of the appeal may lead to the court's coming to a decision which may be in conflict with the decision between the appellant and the deceased respondent and, therefore, it would lead to the court's passing a decree which will be contradictory to the decree which had become final with respect to the same subject matter between the appellant and the deceased respondent; (b) when the appellant could not have brought the action for the necessary relief against those respondents alone who are still before the court and (c) when the decree against the surviving respondents, if the appeal succeeds, be ineffective that is to say it could not be successfully executed."

17. These three testes are not cumulative tests. Even if one of them is satisfied, the court may dismiss the appeal". *(Emphasis added) Ors.*[4], a Constitution Bench of this Court, while dealing with the similar issue, has after considering large number of judgments of this Court, reached the following conclusion :- "(a) In case of "Joint and indivisible decree", "Joint and inseverable or inseparable decree", the abatement of proceedings in relation to one or more of the appellant(s) or respondent(s) on account of omission or lapse and failure to bring on record his or their legal representatives in time would prove fatal to the entire appeal and require to be dismissed in toto as otherwise inconsistent or contradictory decrees would result and proper reliefs could not be granted, conflicting with the one which had already become final with respect to the same subject matter vis-a-vis the others; (b) the question as to whether the Court can deal with an appeal after it abates against one or the other would depend upon the facts of each case and no exhaustive statement or analysis could be made about all such circumstances wherein it would or would not be possible to proceed with the appeal, despite abatement, partially; (c) existence of a joint right as distinguished from tenancy in common alone is not the criteria but the joint character of the decree, dehors the relationship of the parties inter se and the frame of the appeal, will take colour from the nature of the decree challenged; (d) where the dispute between two groups of parties centerd around claims or based on grounds common relating to the respective groups litigating as distinct groups or bodies -- the issue involved for consideration in such class of cases would be one and indivisible; and (e) when the issues involved in more than one appeals dealt with as group or batch of appeals, which are common and identical in all such cases, abatement of

one or the other of the connected appeals due to the death of one or more of the parties and failure to bring on record the legal representatives of the deceased parties, would result in the abatement of all appeals." (Emphasis added) The Court further observed that any relief granted and the decree ultimately passed, would become totally unenforceable and mutually self-destructive and unworkable vis-`-vis the other part, which had become final. The appeal has to be declared abated in toto. It is the duty of the court to preserve and protect the rights of the parties.

18. Court considered the same issue and held as under :- "..... That, so far as the statute is concerned, the appeal abates only qua the deceased respondent, but the question whether the partial abatement leads to an abatement of the appeal in its entirety depends upon general principles. If the case is of such a nature that the absence of the legal representative of the deceased respondent prevents the Court from hearing the appeal as against the other respondents, then the appeal abates in toto. Otherwise, the abatement takes place only in respect of the interest of the respondent who has died. The test often adopted in such cases is whether in the event of the appeal being allowed as against the remaining respondents there would or would not be two contradictory decrees in the same suit with respect to the same subject matter. The Court cannot be called upon to make two inconsistent decrees about the same property, and in order to avoid conflicting decrees the Court has no alternative but to dismiss the appeal as a whole. If, on the other hand, the success of the appeal would not lead to conflicting decrees, then there is no valid reason why the Court should not hear the appeal and adjudicate upon the dispute between the parties." (Emphasis added)

19. Therefore, the law on the issue stands crystallised to the effect that as to whether non-substitution of LRs of the defendants/respondents would abate the appeal in toto or only qua the deceased defendants/respondents, depend upon the facts and circumstances of an individual case. Where each one of the parties has an independent and distinct right of his own, not inter-dependent upon one or the other, nor the parties have conflicting interests inter se, the appeal may abate only qua the deceased respondent.

> "However, in case, there is a possibility that the Court may pass a decree contradictory to the decree in favour of the deceased party, the appeal would abate in toto for the simple reason that the appeal is a continuity of suit and the law does not permit two contradictory decrees on the same subject matter in the same suit. Thus, whether the judgment/decree passed in the proceedings vis-`-vis remaining parties would suffer the vice of being a contradictory or inconsistent decree is the relevant test."

20. The instant case requires to be examined in view of the aforesaid settled legal propositions. Every co-owner has a right to possession and enjoyment of each and every part of the property equal to that of other co-owners. Therefore, in theory, every co-owner has an interest in every infinitesimal portion of the subject matter, each has a right irrespective of the quantity of its interest, to be in possession of every part and parcel of the property jointly

with others. A co-owner of a property owns every part of the composite property along with others and he cannot be held to be a fractional owner of the property unless partition takes place. In the instant case a declaratory decree was passed in favour of respondents/plaintiffs and Smt.

> "Parwatu to the effect that they were co-owners, though, they had specific shares but were held entitled to be in "joint possession". The appellants/applicants had sought relief against Smt. Parwatu before the 1st Appellate court as there was a decree in her favour, passed by the Trial Court where Smt. Parwatu had been impleaded by the appellants/applicants as proforma respondent. In such a fact-situation, she had a right to contest the appeal. Once a decree had been passed in her favour, a right had vested in her favour. On her death on 19.11.2000, the said vested right devolved upon her heirs.
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> Thus, appeal against Smt. Parwatu stood abated. In the instant case, the 1st Appellate Court rejected the application for condonation of delay as well as the substitution of LRs of Smt.
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> Parwatu, respondent No. 4 therein. The only question remains as to whether the appeal is abated in toto or only in respect of the share of Smt. Parwatu. The High Court has rightly reached the conclusion that there was a possibility for the Appellate Court to reverse the Judgment of the Trial Court and in such an eventuality, there could have been two contradictory decrees, one in favour of Smt. Parwatu and the other, in favour of the present appellants. The view taken by the High Court is in consonance with the law laid down by this Court consistently.
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> The facts of the case do not warrant any further examination of the matter."

21. In view of the above, the appeal lacks merit and is accordingly dismissed. No order as to costs.

[1]*AIR 2009 SC 2367*
[2]*AIR 1966 SC 1427*
[3]*AIR 1972 SC 1181*
[4]*AIR 2003 SC 2588*