

CALCUTTA HIGH COURT

Abdul Hamid

Vs.

Durga Charan Das

Civil Revn. Case No. 359 of 1961

(B. Mukherji, J.)

06.09.1966

ORDER

(B. Mukherji, J.)

1. If two of the five appellants die during the pendency of their appeal arising out of a suit instituted by them for recovery of Khas possession of a certain plot of land, reckoning the sole defendant as a trespasser thereon and if the appeal against the two dead appellants abates, no steps having been taken for substitution of their legal representatives, will the appeal as a whole abate? That is the main question debated in this revisional application under Section 115 of the Civil Procedure Code 5 of 1908 at the instance of the three surviving plaintiffs appellants. The learned Subordinate Judge, seized of such appeal, holds, the appeal as a whole abates. Mr. Bijan Behari Das Gupta, appearing for the appellants petitioners, submits, it does not, Mr. Jnanendra Nath Bakshi, appearing for the respondent opposite party, contends for the view taken by the learned Subordinate Judge.

2. The facts which have led up to this revisional petition need not be referred to further than as follows:

The land in controversy is plot No. 952 under Khatian No. 581 of mouza Maheshmati within the jurisdiction of Englishbazar Municipality and police station: Englishbazar being the name by which the municipality and police station of the town of Maldah are known. A plot as this admeasures. 0113 acre of land: vide the relevant Khatian, exhibit A. One Dwark Chandra Das held it as a Korfa tenant on a rent of Rs. 10 under Sahadutunessa. In an action in ejectment brought by her it was suit No. 239 of 1938 - a compromise decree, exhibit 1, came to be recorded on February 23, 1939. By virtue thereof, eviction of Dwarak was ordered. But its effect was postponed. Dwarak having been given a grace period of three years: 1346 to 1348 B. S., during which he was permitted to stay where he was, namely, in the land in controversy, on payment of Rs. 10 a year as rent (Khajna). The further stipulation was that should Dwarak fail to quit by 1348's end, Sahadutunessa would be able to put her decree for eviction to execution. Dwarak did not quit, as he had agreed to do, on the expiry of 1348 B. S. Sahadutunessa was about to lew execution of the compromise decree, as indeed she was entitled to do in terms thereof. But in the

end she took pity on her quondam tenant, as is stated on her behalf and allowed him to stay on for his life as a licensee on a license fee of Rs. 10. While in occupation so and running a shop there, he died in 1949. Durga Charan Das, the sole opposite party before me, is his son. His father's license having been no more, he was asked to quit time and again. But he refused. Hence the suit on September 27, 1951, by Sahadutunessa's five legal representatives two sons and three daughters - (Sahadutunessa having died meanwhile) for recovery of possession of plot No. 952 after eviction of Durga, a mere trespasser, therefrom.

The suit failed in the Court of first instance. An appeal taken against that came to little. The first Court, as also the Court of appeal, held that the suit was barred by Section 47 of the Civil Procedure Code. On the question of tenancy or license, the first Court found that the position of Dwarak and after his death, of Durga continued "in the land as of a tenant"; whereas the appellate Court confined its finding to Dwarak having been a tenant. In a second appeal taken to this Court, Purushottam Chatterjee, J. reversed the decision of the Courts below on Section 47 having stood between the plaintiffs and their success. More, his Lordship directed a remit to the lower appellate Court with a view to coming to a finding as to the status of the defendant, making it clear:

"If the Court finds that he is still a tenant the suit will be dismissed. If the Court finds that the defendant is not a tenant, the suit should be decreed."

During the carriage of the appeal on remit, this question of abatement arose. The two daughters of Sahadutunessa, Bibi Jobeda Khaton (appellant No. 3) and Bibi Jinnatanessa (appellant No. 4), died. No steps were taken for substitution of their legal representatives. In the circumstances, the learned Subordinate Judge held that "the entire appeal" had abated. Hence this rule.

3. The principle the learned Judge has governed himself by is, in his own words:

"The principal relief, namely, recovery of possession, cannot be granted unless the entire body of owners are represented in the suit. A suit for possession cannot be decreed in a suit brought by a fractional sharer alone. Applying this principle, the present appeal by the surviving appellants alone is incompetent."

I am unable to consider this a sound principle to go by, the nature of the suit being what it is; a suit for recovery of possession from a trespasser. Whether the suit is good or bad on merits is another matter. As Chatterjee, J. has directed, if the learned appellate Judge finds Durga to be a tenant, the suit will fail, the death of the two of the appellants and the consequential abatement being then neither here nor there. If however the finding is that Durga is not a tenant, but a trespasser, the suit shall succeed, as the further direction of Chatterjee, J. is. In this context, it matters little that the appeal has abated, if that against two of the five appellants. Because, it is now well held that a co-owner is entitled to sue a trespasser for the benefit of all and what a type of co-owner do I see here? A Mahomedan co-owner to ascertain whose share all you have to do is a little arithmetic. To run on with the principle I go by, there is the observation of Rankin, C. J. (as his Lordship then was) in Letters Patent Appeal No. 104 of 1928, quoted by Nasim All, J. in *Joy Gopal Singha v. Probodh Chandra Bhattacharjee*¹, the well settled practice in this Court is to give a decree "for joint possession together with the trespasser and leaving it to the plaintiff to

work out his further rights by a suit for partition." It is no good sniffing at such a decree, about which the learned Chief Justice says further:

"I do not think there is anything unusual in the form of the decree."

On a point as this, there is a long line of decisions, some of which I collected in a judgment rendered by me, if I may quote my own decision without any impropriety on my part, in *Shew Prasad Agarwalla v. Anil Ganguli*²,

4. So, why should the whole suit fail? and why should the appeal as a whole abate? If a co-owner with an ascertainable share dies and if the appeal abates against him, his co-owner with an ascertainable share too, though living, 'dies' too and the appeal abates against him as well! That, I venture to think, is neither reason nor law. It may, however, be said that the suit is for recovery of possession after eviction of the defendant, not for recovery of joint possession with the defendant. That against matters little. Take a case where, only confirmation of possession, the suing party prays the Court for. When it comes to the recording of a decree, it transpires from the evidence that the plaintiff was not in possession at the date of the institution of the suit. The Court thereupon passes a decree for delivery of Khas possession, no specific prayer is there though to that end. Such a decree is above reproach. Indeed, not to pass such decree would be a meaningless technicality, as held by Sir Ashutosh Mookerjee sitting with Beachcroft, J. in *Jhuma Karti v. Debu Lal Singh*³, The same principle will apply here. The greater includes the less. and it is always open to the Court to mould its decree to suit the exigencies of the situation (as it obtains here) by granting the surviving plaintiffs appellants, the petitioners before me, a decree for joint possession with the defendant opposite party instead of a decree for recovery of Khas possession after evicting him; just what they had originally prayed the Court for, provided that they succeed in proving the defendant to be not a tenant, but a trespasser, in terms of Chatterjee J.'s direction.

5. Mr. Bakshi raises the point that what the share of the surviving appellants comes to is not known. The record of the Court of appeal below reveals that they claim 5/7th share. True, it is no more than a claim. But that is of the least materiality. What is of the utmost materiality is that they, the legal representatives and heirs of Sahadutunessa, have certain shares, to be sure. and that will be worked out in a suit for partition. If they otherwise succeed in the present litigation.

6. Could I have called in aid Order 41, Rules 4 and 33, as a Full Bench of this Court did in *Santosh Kumar Mondal v. Nandalal Chakrapani*⁴, my task would have been so much the easier. But in view of the Supreme Court decision in *Rameshwar Prasad v. Shambhari Lal Jagannath*⁵, it is no longer open to me to do so. Once an appeal has been filed by all the appellants (as here), Order 41, Rule 4, operating at the institution of the appeal, ceases to be available and Order 22, operating during the pendency of the appeal, rules its carriage. The discretionary power Order 41, Rule 33, invests the appeal Court with, cannot be exercised to nullify the effect of abatement of the appeal against the two deceased appellants (as here). Nor is R. 33

²(1964) 68 Cal WN 786 at p. 802 : 1963 Cal LJ 75

³22 Cal LJ 415 at p. 418 : AIR 1915 Cal 816 at p. 818

⁴44 decided on August 17, 1962 and come into the reports in May 1963, AIR 1963 Cal 289 (FB)

⁵5 decided on May 3, 1963 and come into the reports in December of the same year; AIR 1963 SC 1901

intended to apply to an appeal rendered incompetent against the two deceased appellants by reason of the abatement (also as here). Such is the law laid down by Raghubar Dayal, J., speaking for the Court, in Rameshwar's case, AIR 1963 Supreme Court 1901 (supra), making the Full Bench decision of this Court, in so far as it goes by Order 41, Rules 4 and 33, bad law. and on the strength of this very case, Mr. Bakshi wants me to reach the same conclusion the learned Subordinate Judge has come to. There, in a second appeal filed by nine plaintiffs, Kedar Nath, the third appellant, died. and no application having been made within the prescribed time for bringing his legal representatives on record, the appeal abated against him in view of the combined effect of Rules 3 and 11 of Order 22. Furthermore, the appeal abated as a whole. Similarity as this appears to be deceptive. Because, that was an action in ejectment against a tenant and a tenant's tenant. Had the litigation in hand been just so, certainly I would have come to the same conclusion. The decree appealed against would have been then joint and indivisible. But the litigation in hand is a litigation by Mahomedan co-owners, each of whom has a share, specific and certain, for eviction of a trespasser. The decree appealed against is not, therefore, joint and indivisible. Each co-owner has his separate right on the foot of his or her ascertainable share against such a one; a trespasser. More, the result will not be two inconsistent or contradictory decrees. The abatement of the appeal against the appellants numbering 3 and 4 means that the dismissal of the suit against them by the primary Court has become final and beyond the reach of the appellate Court. Be it so. The decree, if any, obtained by the surviving appellants will be a decree for joint possession only with the trespasser, they being at liberty to work out their further rights in proportion to their shares by a suit for partition, without impinging in any way on the primary Court's decree of dismissal against the appellants numbering 3 and 4. Where then is the inconsistency between two decrees - a position which the Court always avoids? Therefore, the Supreme Court decision Mr. Bakshi relies upon appears to be clearly distinguishable. The mark of distinction is this. That decision rests on an action in ejectment against a tenant. The impugned decision in hand rests on an action by Mahomedan co-owners for eviction of a trespasser. The outlook in one cannot be the outlook in another.

7. Mr. Das Gupta relies on another Supreme Court decision; *Daya Ram v. Shyam Sundari*⁶, where Ayyangar J., speaking for the Court lays down the law thus; it is not the intention of the legislature in having enacted rule 4, Sub-rules 1 and 3, that unless each and every one of the legal representatives of the deceased defendants, where they are several, is brought on record, there is no proper constitution of the suit or appeal with the result that the suit or appeal would abate. On the contrary, the true rule is that where a plaintiff or appellant after diligent or *bona fide* inquiry ascertains who the legal representatives of a deceased party are and brings them on record within the time limited by law, there is no abatement of the suit or appeal. More, the legal representatives so impleaded sufficiently represent the estate of the deceased and a decision obtained with them on record will bind not merely those impleaded but the entire estate including those not brought on record. Such being the law laid down, it goes against Mr. Das Gupta. As Mr. Bakshi pertinently points out, what is seen here is not diligence, but utter lack of it. because nothing could have been easier for the surviving appellant than to bring on record the legal representatives of their deceased sisters, Jobeda Khatoon and Jinnatannessa. Yar Muhammad and Md. Munna having been stated by Durga, the defendant opposite party, in an affidavit filed in this court, to be the husband and son respectively of Jobeda with no

⁶ AIR 1965 SC 1049

denial by a counter-affidavit. So, Daya Ram's case AIR 1965 Supreme Court 1049 can do the petitioners little good.

8. Mr. Das Gupta also refers me to an interlocutory order rendered by P. N. Mookerjee and A. C. Gupta JJ, on *in Sk. Md. Elias v. Bibi Samudannessa*⁷; where their Lordships hold that there would not be any question of abatement, some of the heirs of a deceased respondent having already been on record and order substitution of those left out, in order to cure a formal defect or irregularity, or as Ayyangar J. puts it in Daya Ram's case AIR 1965 Supreme Court 1049 (supra) with a view to "making the record complete." But I have no materials before me on which I can find that the surviving appellants are the heirs of the two deceased ones. On the contrary, if I have to go by the opposite party Durga's affidavit before me, Jobeda (appellant No. 3) died leaving behind her surviving her husband Yar Muhammad and a son Md. Munna In that case. Yar Muhammad's normal share would come to 1/4th as a sharer and Md. Munna's to 3/4th as a residuary, taking them as I do to be governed by the Hanafi law of inheritance, leaving nothing to the surviving appellants. But much more is needed than a bare affidavit by a stranger to the family of the appellants to come to a dependable finding. About Jinnatanessa (appellant not also dead) I know next to nothing, save that ? from the Bar that her husband is one Abul Hamid Dewan. In the circumstances, it is but right that I keep the whole matter open for decision by the lower appellate court upon evidence. If it finds that the surviving appellants are some of the heirs of the two deceased ones, Bibi Jobeda Khatoon and Bibi Jinnatanessa, no question of abatement there will be. The Court will then bring the heirs, not impleaded so long, on record with a view to making its record complete and proceed with the hearing of the appeal in the light of Chatterjee J.'s directions. If, however, the court finds that the surviving appellants are not some of the heirs of either of the deceased ones, Jobeda or Jannatanessa. the appeal will be taken as having abated as against them or one of them some of whose heirs the surviving appellants are not. and the court will proceed to hear the appeal in the light of Chatterjee J.'s directions supplemented by mine.

9. In view of all that goes before, it is clear to me that the learned appellate judge has failed to exercise a jurisdiction vested in him by law. His order of total abatement of the appeal cannot therefore be sustained.

10. In the result, the rule succeeds and be made absolute. The order complained of be set aside. The court of appeal below do hear the appeal in the light of directions contained herein before. Each party will pay and bear its costs.

11. This is a revision case of 1961, Chatterjee J. rendered his judgment in the second appeal on November 17, 1959; paragraph 2 ante. and the records reached the lower appellate court on September 8, 1960 some ten months later, as I find from the orders in the order-sheets. So that such a sorry state of affairs may not recur, I direct that the records be sent down within a fortnight from this date and that compliance with this directive be reported to the Registrar. Appellate Side, of this court immediately thereafter.

Rule made absolute.

⁷ August 26, 1966, First Appeal No. 652 of 1961 (Cal)