

BOMBAY HIGH COURT

Kamalabai

Vs.

Ramdas

Second Appeal No. 457 of 1979

(S.K. Desai, J.)

14.10.1980

JUDGEMENT

S. K. Desai, J.

1. This is a Second Appeal filed from the decision given by the learned Assistant Judge, Dhule, in Civil Appeal No. 69 of 1976 on the District Court file, holding that the appeal before him had abated with effect from 8-7-1977. In order to understand the points in controversy the following facts may be noted.

2. The appellant before me is one Kamalabai who was married to Ramdas Ingale on 13-5-1956. A child, daughter by the name of Pratibha, was born to the said couple on 7-8-1959. It appears that some time in 1962, according to the husband, the wife suffered from some illness and a matrimonial petition was filed by the husband in the Bombay City Civil Court at Bombay on the ground of wife's insanity or unsoundness of mind. On 10-4-1964, the said petition was withdrawn. Between September, 1965 and February, 1968, Ramdas proceeded to the United Kingdom for further studies. After his return he filed a matrimonial proceeding viz., a petition for restitution of conjugal rights in the Court of the Civil Judge, Dhule. This proceeding was compromised. The wife submitted to a decree and it appears that for a few months there was actual cohabitation. Again, according to the husband, in January, 1970, the wife became unwell and on 14-9-1971, Hindu Marriage Petition No. 102 of 1971 was filed by the husband against the wife which was ultimately tried by the learned Civil Judge, Senior Division, Dhule. The husband had sought divorce on a number of grounds. He has also sought judicial separation. All the allegations in the petition were denied by the wife. Necessary issues were framed. Evidence was led and ultimately the Court held as disproved the allegations of cruelty and desertion. It, however, held as proved that the respondent-wife was incurably of unsound mind for a continuous period of not less than three years immediately preceding the presentation of the petition. This issue was thus answered in favor of the husband. The technical pleas raised on

behalf of the wife based on the provisions contained in Order 23 and Order 2 of the C.P. Code were negated. Similar pleas as to delay and the husband taking advantage of his own wrong were also rejected and a decree of divorce dissolving the marriage was ultimately passed on 22-3-1976.

3. The aggrieved wife preferred an appeal to the District Court at Dhule. The said appeal came to be numbered as Civil Appeal No. 69 of 1976. It transpires that during the pendency of the said appeal the Respondent husband (original petitioner) died on 8-7-1977. A rather piquant situation arose and the advocate for the appellant wife brought on record as the husband's heir and legal representative the child Pratibha. Subsequently in the appeal Ex.32 (a purshis for compromise) was filed, but the same was not acted upon. Ultimately, the appeal came to be considered by the Assistant Judge who held that upon the death of the husband the heirs could not be brought on record and he also rejected the further argument that by reason of the death of the husband the original petition must be deemed to have abated. In the view of the learned Assistant Judge it was the wife's appeal which had abated. In his opinion, the order passed earlier on Ex.25, bringing the heir of the husband Pratibha on record was not a proper order. Accordingly, the learned Assistant Judge dismissed the appeal formally as in his opinion it abated on the death of the husband.

4. The aggrieved wife has filed this Second Appeal. As the legal position was not clear and as I wanted effective representation on both sides. I requested Mr. Dalvi to appear as amicus curiae and both Mr. Panse and Mr. Dalvi have rendered great assistance to me.

5. Before advertng to the two authorities referred to by the learned Assistant Judge it may be observed that a very curious position would arise if the view of the learned Assistant Judge were to be accepted as the correct view. In this case the wife has been found to be of unsound mind and a decree of divorce passed. If the decree stands, the marriage tie stands dissolved which would disentitle the wife from claiming any share in her deceased husband's property although in the instant case the entire property may go to the child Pratibha. However, the position would assume a different character if there had been no child of the marriage. To take another similar case, suppose the husband had claimed divorce on the ground of adultery of the wife with a named correspondent and the trial Court had upheld the plea after recording evidence and had passed a decree of divorce. If in such a case the aggrieved wife or the co-respondent or both had appealed and the husband had subsequently died before the appeal could be disposed of, would such an appeal also abate leaving the judgment of the trial Court to hold the field without giving to the parties who are branded adulterers an opportunity of scrutiny or correction of that conclusion? This would appear most inequitable and unjust. It would thus be clear that such judgments may decide important points and in case of death during the pendency of the appeal the view of the trial Court which is impugned and which is assailable would be required to hold the field and prevail if the view of the Assistant Judge is correct that the right to sue or the right of action does not survive.

6. The learned Assistant Judge has referred to the decision of a Division Bench of this Court

reported in *Suhas Manohar v. Manohar Shamrao*¹, In his view this authority supports the conclusion which he has reached; but it would appear to me that the learned lower appellate Judge has not read the Division Bench judgment carefully. The relevant observations are to be found at page 418. The Bench was principally considering what would happen in such a case where in a pending appeal the respondent wife had died and the advocate on behalf of the appellant-husband had not taken steps to bring her heirs on record and rested content with stating to the Court that appeal had abated. In such a case according to the Division Bench the judgment of the trial Court will remain effective and

¹74 Bom LR 414

if that judgment has disposed of some issue, then in a subsequent suit if the very same controversy was sought to be reagitated, then the point would be required to be met with the plea of res judicata. In the context, however, of considering what had happened in the appeal, the Division Bench seems to have observed that it would have been open to the aggrieved appellant husband to have applied to the Appellate Court to have the heirs or legal representatives of the wife brought on record but no such thing was attempted to be done. In fact, the advocate for the husband made a specific statement to the Court accepting abatement of the appeal. To a certain extent then the discussion is obiter, but the tenor of that discussion is clearly against the view taken and the conclusions reached by the learned Assistant Judge. The opinion of the Division Bench was that had an application been made in the appeal to have the heirs brought on record, the heirs could have been brought on the record, the appeal would not have abated and the rights of the appellant husband and of the deceased wife could have been determined by the appellate Court and the appellate Court decision would then have held the field and not that of the trial Court. The learned Assistant Judge also referred to the decision of a Division Bench of the Andhra Pradesh High Court in *Sunanda v. Venkata Subbarao*², The observations in this judgment, to some extent, do support the view taken by the learned Assistant Judge. Again, the point directly under consideration was different and the observations which support the learned Assistant Judge can be regarded as obiter. According to the Division Bench of the Andh. Pra. High Court the legal position was clear and the equities or inequities could not alter the legal position. According to the division bench an innocent wife may have her image tarnished by those unfortunate circumstances viz., the death of the husband during the pendency of the appeal, but according to the Bench in the same way a guilty wife may get the benefit of the position.

7. However, the approach of the Division Bench of the Andhra Pradesh High Court is totally contrary to the approach of the Division Bench of the Bombay High Court in *Suhas Manohar's* case (AIR 1971 Bombay 183) and it is the latter approach which I must follow and was required to be followed by the learned Assistant Judge.

8. It may be conceded that the position is not free from doubt, but where this is so, equitable considerations must prevail and bearing in mind the nature of the conclusion, the far-reaching effect of the findings of the Court, both on personal status and property rights, it is desirable that the party aggrieved by the decree of the trial Court must have the opportunity to have the

findings reversed and this opportunity must be assured irrespective of the death of the respondent.

9. It must be opined, however, that the decision in the Appellate Court cannot be obtained reversing the trial Court or modifying the trial Court by any compromise. In the peculiar circumstances of the case such compromise must be ignored and the Appellate Court must dispose of the appeal on merits. Even if it finds the respondent not supporting the judgment of the trial Court or making only a pretence of supporting it, it may, in an appropriate case, ask some Advocate to assist the Court and decide the appeal only after proper assistance is forthcoming.

10. In the result, the Second Appeal is allowed and the order of the learned Assistant Judge, Dhule, observing that the order passed on Ex.25 bringing Pratibha on record was

² AIR 1957 And Prad 424

not legal, cannot be maintained. In my opinion, this order was legal and the appeal was thereafter required to be heard on merits and not treated as having abated. The learned Assistant Judge, however, was right in not accepting the compromise, though for different reasons. This is not an ordinary property or money claim which can be allowed to be compromised in this manner. If the wife is entitled to justice she must claim and secure that justice by appropriate arguments and not through a compromise with her own daughter. It will be for her to establish before the appellate Court that the decree of the trial Court declaring her to be of unsound mind for a period of three years prior to the presentation of the matrimonial petition was incorrect. This must be established by argument and not by compromise. Subject to these directions, the impugned order holding that the appeal has abated is set aside and the appeal will now be disposed of by the District Court at Dhule in accordance with my observations. At that stage while disposing of the appeal on merits it will exercise all the usual powers of an appellate Court as provided by the Civil Procedure Code.

11. There shall be no order as to costs.

Appeal allowed.