

RAJASTHAN HIGH COURT

Chandra Bai

Vs.

Khandal Vipra Vidyalay Samiti

Special Appeal No. 23 of 1991
(R.C. Gandhi and Dr. Vineet Kothari, JJ.)

17.07.2007

JUDGEMENT

R. C. Gandhi, J.

1. This Special Appeal has been preferred under Section 18 of Rajasthan High Court Ordinance, 1949 against the judgment dated 28-5-1991 passed by the learned single Judge whereby he set aside the judgment and decree dated 11-12-1979 and also reversed the findings of the trial Court arrived at vide order dated 26-11-1979 dismissing the application of respondent No.1 assignee/buyer of the suit property filed under Order 22, Rule 10 of Civil Procedure Code.

2. The brief facts necessary for the disposal of the appeal are that some property of Nawab Moazzam Ali Khan was declared as evacuee property. He was not having any means to litigate and get it deleted from the record as an evacuee property. He executed an agreement dated 8-2-1957 with Asgar Hussain of Allahabad that Asgar Hussain will contest the proceedings before the authorities for deletion of the property and in turn shall be entitled to h share of the property so deleted from the record of the evacuee property. Agreed share was not given to Asgar Hussain. Asgar Hussain filed a suit against Nawab Moazzam Ali Khan based on the said agreement. Moazzam Ali Khan is the father of the respondent Nos. 2, 3 and 4 and grand-father of respondent Nos. 2/2 to 2/5 who were claiming h share of the property mentioned in the Schedule annexed with the plaint and in the alternative the price thereof. The suit was contested by the defendant before the trial Court and the preliminary decree came to be passed on 28-2-1963 declaring that the plaintiff is entitled to share in the property restored to the defendant Nawab Moazzam Ali Khan. The said preliminary decree came to be confirmed by the High Court on 18-3- 1971. During the pendency of the appeal, two

Commissioners were appointed for execution of the decree by metes and bounds. Reports have been submitted by the Commissioners.

3. During the pendency of the suit, property was attached for the reason that the defendant may not alienate the property. On filing an undertaking by the defendant, the attachment order was withdrawn. Malika Aminujmani Begum was substituted as assignee plaintiff on the basis of alleged assignment on 23-8- 1967. Thereafter similarly Chandra Bai-appellant was substituted in place of Malika Aminujmani Begum on the basis of further assignment as plaintiff. On 7-8-1967 Abdul Kadir son of deceased Nawab Moazzam Ali Khan transferred the suit property to the Khandal Vipra Vidyalaya Samiti for a consideration of Rs. 40,999/-. The proceedings continued till 22-9-1979 and till then statement of Abdul Kadir was not recorded. While the evidence was being recorded on 16-10- 1979 in the Court, it was noted that there was some talk of compromise between the parties but the compromise was not filed before the Court. The suit was fixed for 6-11-1979 and further adjourned to 12-11-1979. On that date, an application was presented on behalf of the plaintiff that compromise between the parties may be taken on record. The compromise was verified on 12-11-1979 and the suit was fixed for judgment on 17-11-1979.

4. On 20-11-1979, an application under Order 22, Rule 10 of Civil Procedure Code was presented by the Samiti with the prayer that Khandal Vipra Vidyalay Samiti respondent No. 1 assignee be impleaded as party respondent as its rights are prejudiced by way of compromise. Learned trial Court dismissed the application of the Samiti-respondent No.1 vide order dated 26-11-1979 observing that the application has been filed at belated stage though it was also recorded in the order that the affidavit has not been supported but no finding came to be recorded on this point. The trial Court passed the final decree on 11-12-1979.

5. Appeal was preferred by the Samiti- respondent No.1 before the learned single Judge challenging the order dated 26-11-1979, whereby the application under Order 22, Rule 10, Civil Procedure Code was dismissed and also against the final decree dated 11-12-1979.

6. Learned single Judge, on appreciation of record and after hearing learned counsel for the parties, came to the conclusion that the approach of the trial, while rejecting the application presented by the assignee under Order 22, Rule 10 of Civil Procedure Code, is erroneous. The learned single Judge relied upon various judgments of the Apex Court in support of his view. As a consequence thereof, the decree and judgment

of the trial Court was set aside and the suit was remanded back to the trial Court to re-consider the application of the assignee.

7. The present appeal has been filed by the plaintiff-appellant on the ground that the trial Court has taken the correct view in dismissing the application and that the preliminary decree has been confirmed and thereafter the parties have compromised the lis giving h share to the plaintiff as sought for in the suit and the application filed by other side is unnecessary and the view taken by the learned single Judge that the application should have been allowed is erroneous and needs to be set aside.

8. Heard learned counsel for the parties and perused the record.

9. Learned counsel for the appellant has reiterated the arguments at the Bar as noticed above. Learned counsel for the respondents, in rebuttal, has submitted that the Samiti purchased the suit property on 7-8-1967 to the extent of share contained in Schedule (Ka) annexed with the plaint and has stepped into the shoes, therefore, the order and the judgment under appeal has not rightly and legally been set aside by the learned single Judge. To elaborate the argument, it is submitted that the Samiti, from the date of purchase of the property, was assisting and financing the defendant in prosecution of the suit and that the compromise deed has been verified by the counsel for the other side and also drafted by them, therefore, the compromise has prejudiced the rights of the Samiti. It is further submitted that it was necessary for the Court to impale the applicant-assignee as party in the suit as his rights are going to be prejudiced and at its back, fraud has been committed with the Samiti to defeat its right.

10. So far as the question of filing affidavit along with application is concerned, though it has been noticed by the trial Court but no findings have been returned thereon. The respondent-Samiti filed affidavit before the appellate Court and that too has not been objected by the appellant and this issue in second appeal cannot be permitted to be raised. Learned counsel should have invited attention of the trial Court on this aspect by way of review petition which has not been done.

11. So far as the order of the learned trial Court with regard to dismissal of the application under Order 22, Rule 10 of Civil Procedure Code is concerned, learned counsel for the respondents has relied upon the judgment in case title *Amit Kumar Shaw and Anr. v. Farida Khatoon and Anr.*, reported in ¹ to make out that the trial Court was justified in dismissal of the application being belatedly filed. The Apex Court in paras 10, 12 and 17 has observed as under:

10. "The power of a Court to add a party to a proceeding cannot depend solely on the question whether he has interest in the suit property. The question is whether the right of a person may be affected if he is not added as a party. Such right, however, will include necessarily an enforceable legal right.

12. Under Order 22, Rule 10, no detailed inquiry at the stage of granting leave is contemplated. The Court has only to be *prima facie* satisfied for exercising its discretion in granting leave for continuing the suit by or against the person on whom the interest has devolved by assignment or devolution. The question about the existence and validity of the assignment or devolution can be considered at the final hearing of the proceedings. The Court has only to be *prima facie* satisfied for exercising its discretion in granting leave for continuing the suit."

17. In the instant case, the applications for substitution were filed by the respective appellants in the second appeals which are still pending on the file of the High Court though it was filed in the year 1993. The appellants have properly, sufficiently and satisfactorily explained the delay in approaching the Court. We see *bona fide* in their explanation in not coming to the Court at the earliest point of time. Therefore, the appellants who are transferees pendente lite should be made as parties to the pending second appeals as prayed for by them. In our opinion, the High Court has committed serious error in not ordering the applications for substitution filed by the appellants. In our view, the presence of the appellants are absolutely necessary in order to decide the appeals on merits. Since the High Court has committed an error by rejecting the appellants' applications for substitution treating the same as additional parties and thereby rendering the appellants non-suited. We have no hesitation in setting aside the said orders and permit the appellants to come on record by way of substitution as rayed for. The High Court proceeded on a wrong premise that the appellants had made the application for addition of party whereas the application under consideration was for substitution as the owner had sold the suit property to the appellants and had no interest in the pending litigation."

12. Learned counsel for the respondents has further relied upon the judgment reported in (*Nanjammal and others v. Eswaramurthi Goundar minor by guardian and mother Karunai Ammal and another*) ² wherein the application under Order 22, Rule 10 of Civil Procedure Code filed came to be allowed by the learned single Judge. The Court while dealing with the scope and object of the Order 22, Rule 10, Civil Procedure Code has observed as under:

"Under Order 22, Rule 10 Civil Procedure Code when there is an assignment or devolution of interest during the pendency of a suit, the suit may by leave of the Court be continued by or against the person to or upon whom such interest has come or devolved. An alienation 'pendente lite' is subject to the rule of 'lis pendens' enacted in Section 52, T. P. Act, and the alienee if he is not imp leded as a party and does not object to any compromise behind his back between his alien or and the other party to the suit, would be bound by the compromise reached between them, unless thereafter he would be able to establish in a separate suit that the compromise was collusive and fraudulent. His right to get himself imp leded as a party and to object to a compromise arrived at between his alienator and the opposite party has been recognized in this Court by the Full Bench decision in '*Veeraghava Reddi v. Subba Reddi*', ³ It was there laid down that an alienee 'pendente lite' who had been added as a party to the litigation was entitled to object to a decree being passed in terms of a compromise arrived at between his alienor and the opposite party."

13. The Court ultimately set aside the order of the trial Court whereby the application was dismissed and remanded it back to trial Court for disposal in accordance with law. He has also relied upon the judgment reported in (*Smt. Saila Bala Dassi v. Smt. Nirmala Sundari Dassi and another*) ⁴ wherein the application under Order 22, Rule 10 of Civil Procedure Code was filed after 18 years, the Court while dealing with it observed as under:

"It is contended on behalf of the appellant that her application is maintainable under Order 22 Rule 10 of the Civil Procedure Code, because Suit No. 158 of 1935 must be considered to have been pending until the decree therein was drawn up which was in 1954, and the transfer in her favor had been made prior thereto on May 12, 1952. The decision in *Lakshan Chunder Dey v. Sm. Nikunjamoni Dassi*, ⁵ is relied on, in support of this position. But it is contended for the first respondent that even if Suit No. 158 of 1935 is considered as pending when the transfer in favour of the appellant was made, that would not affect, the result, as no application had been made by her to be brought on record in the original Court during the pendency of the suit. Nor could the application made to the appellate Court be sustained under Order 22 Rule 10 as, the transfer in favor of the appellant was made prior to the filing of that appeal and not during its pendency. This contention appears to be well-founded; but that, however, does not conclude the matter. In our opinion, the application filed by the appellant falls within Section 146 of the Civil Procedure Code, and she is

entitled to be brought on record under that section. Section 146 provides that save as otherwise provided by the Code, any proceedings which can be taken by a person claiming under him. It has been held in *Sitharamaswami v. Lakshmi Narasimha*, *ILR* ⁶ that an appeal is a proceeding for the purpose of this section, and that further the expression "claiming under" is wide enough to include cases of devolution and assignment mentioned in Order 22, Rule 10. This decision was quoted with approval by this Court in *Jugalkishore Saraf v. Raw Cotton Co. Ltd.*, ⁷ (D), wherein it was held that a transferee of a debt on which a suit was pending was entitled to execute the decree which was subsequently passed therein under Section 146 of the Civil Procedure Code as a person claiming under the decree- holder, even though an application for execution by him would not lie under Order 21 Rule 16, and it was further observed that the words "save as otherwise provided" only barred proceedings, which would be obnoxious to some provision of the Code."

14. The view taken in *Saila Bala Dassi's* case has been followed and reiterated in case title *Rajkumar v. Sardari Lal and Ors.*,⁸ reported in observing as under :

"The doctrine of *lis pendens* expressed in the maxim 'ul lite pendente nihil innovator' (during a litigation nothing new should be introduced) has been statutorily incorporated in Section 52 of the Transfer of the Property Act, 1882. A defendant cannot by alternating property during the pendency of litigation, venture into depriving the successful plaintiff of the fruits of the decree. The transferee *pendente lite* is treated in the eye of law as a representative in interest of the judgment-debtor and held bound by the decree passed against the judgment-debtor though neither the defendant has chosen to bring the transferee on record by apprising his opponent and the Court of the transfer made by him nor the transferee has chosen to come on record by taking recourse to Order 22, Rule 10 of the Civil Procedure Code. In case of an assignment creation or devolution of any interest during the pendency of any suit to grant leave for the person in or upon whom such interest has come to vest or devolve to be brought on record. Bringing of a *lis pendens* transferee on record is not as of right but in the discretion of the Court. Though not brought on record the *lis pendens* transferee remains bound by the decree."

15. Learned counsel for the appellant has laid much stress on the point that the application filed being belatedly has rightly been dismissed as the Samiti has failed to explain the delay. Learned counsel for the respondents has relied upon the judgments (*supra*) where application under Order 22, Rule 10 of Civil Procedure Code was filed

after 18 years and the Court followed it.

16. Learned counsel for the appellant has not shown any law or judgment where the law of limitation has been made applicable to the application filed under Order 22, Rule 10 of Civil Procedure Code. Law of limitation is made applicable to Rules 3 and 4 of Order 22 of Civil Procedure Code, which shows the intendment of the legislature. Though it has been applied to other rules contained in Order 22 but it was not felt necessary by the legislature to apply the provisions of law to Order 22, Rule 10 of Civil Procedure Code. Learned counsel in support of his plea has relied upon the judgment delivered in case title *Bajjnath Ram and others v. Tunkowati Kuer and Ors. reported in* ⁹ wherein the Court was dealing with the similar proposition, where the application was rejected by the lower Court, the Full Bench of Patna High Court allowing the application observed as under :

"Another thing to notice in connection with this rule is that a party on whom the interest of the deceased plaintiff or defendant devolves is not entitled to continue the suit or appeal as a matter of right. It is essential to obtain the leave of the Court. The granting of leave is within the discretion of the Court. The Court, however, is to exercise its discretion judicially and according to well established principles. Further, unlike Rules 3 and 4, no limitation is prescribed for presentation of an application under this rule and no penalty is laid down for failure to substitute the person on whom the interest of the deceased plaintiff or defendant has devolved. Therefore, the right to make an application under this rule is a right which accrues from day-to-day and can be made at any time during the pendency of a suit. There is no abatement under this rule."

17. On appreciation of the arguments and the law cited at the bar, we find that while deciding the application, the Court has to exercise the discretion judiciously and it should not result into miscarriage of justice. The assignee unless brought on record, cannot protect his interest, therefore, is required to be arrayed as party in the proceedings during the currency of suit or subsequent proceedings which includes even execution of the proceedings . It is settled law that an assignee on being arrayed as party, steps into the shoes of the transferor to take part in the proceedings with the leave of the Court ceased of the lis. The learned single Judge has, in the course of the judgment, made such assertions while allowing the application relying upon various judgments. We, therefore, uphold the order of the learned single Judge. The judgment, under appeal, does not suffer from any illegality and is upheld. The appeal being devoid of merit is dismissed.

Appeal dismissed.

Cases Referred.

1. 2005 (3) Supreme 670: (AIR 2005 SC 2209)
2. AIR 1954 Mad 592
3. AIR 1920 Mad 391 (FB)
4. AIR 1958 SC 394
- 5.27 Cal WN 755: (AIR 1924 Cal 188)
6. 41 Mad 510: (AIR 1919 Mad 755)
- 7.1955-1 SCR 1369: (AIR 1955 SC 376)
8. 2004 (1) SC 532: (2004 AIR SCW 470)
9. AIR 1962 Pat 285