

RAJASTHAN HIGH COURT

Bajrang Lal

Vs.

Dal Chand (Rajasthan)

C.M.A. No. 1084 of 2006

(Prakash Tatia, J.)

21.11.2008

ORDER

Prakash Tatia, J.

1. Heard learned counsel for the parties.
2. The appellants are aggrieved against the impugned order dated 26-4-2005 by which the first appellate Court - Court of the Additional District Judge, Ratangarh (Churu) dismissed the appeal of the appellants as abated due to the death of defendant/respondent Dal Chand as in regular first appeal, the plaintiff/appellant did not choose to file any application for bringing on record the legal representatives of Dal Chand.
3. Brief facts of the case are that one of the defendants Khetu Lal took loan from another defendant Revat Mal Said Revat Mal filed a suit for recovery of the money which was decreed by the trial Court as back as on 20-10-1965. Said Revat Mal submitted execution petition No. 46/67 for recovery of the said decretal amount of Rs. 609/- only and in the said execution, the house of judgment debtor Khetu Mal was auctioned for a consideration of Rs. 9,775/-. The reserve price was Rs. 5,000/- only. After the said auction, the present appellants - sons of judgment debtor Khetu Mal filed a suit for declaration that the suit property was ancestral property of Khetu Mal and, therefore, he could not have mortgaged it to another creditor Dal Chand. They also sought relief for cancellation of the mortgage deed executed in favour of Dal Chand. It may be relevant to mention here that Dal Chand also obtained the decree on 26-1-1971 for the house in question and the final decree was passed in favour of Dal Chand. In the suit both the creditors Revatmal and Dal Chand were impleaded as parties including ancestor of the appellants - Khetu Lal. The execution of sale was

also challenged in the suit. The trial Court dismissed the plaintiffs suit vide judgment dated 2-12-1989 on merit. The plaintiffs/appellants preferred regular first appeal against the dismissal of the suit. During the pendency of the first appeal, one of the defendants Dal Chand died on 2-12-1994. On 26-2-1999, the respondent No. 3 submitted an application seeking dismissal of the appeal as abated. Yet no application was submitted by the appellants for bringing on record the legal representatives of defendant Dal Chand. The appellate Court after considering that Dal Chand was necessary party in the suit and appeal and he is mortgagee of the house in dispute and relief has been sought against said Dal Chand and that relief was about declaration of mortgage deed executed by defendant Khetu Lal dated 27-8-1962 as null and void, held that in absence of Dal Chand or his legal representatives, the mortgage deed dated 27-8-1962 cannot be declared illegal and null and void and consequently, the appeal was dismissed. Hence, this misc. appeal has been preferred by the appellants.

4. During the pendency of the present appeal, Khetu Lal, father of the appellants, also died on 28-1-2006. Respondent No.3 Dalpat Rai, auction purchaser of the house, submitted an application before this Court praying that this appeal may also be dismissed on count of death of respondent No. 4 Khetu Lal and for not impleading his legal representatives in appeal. The appellants submitted that the appellants No. 1, 2 and 3 are the sons of deceased Khetu Lal, therefore, the appeal cannot abate.

5. It will be worthwhile to mention here that the present appeal has been preferred without impleading the legal representatives of Dal Chand as well as of Revat Mal who both died before the appeal was preferred. For respondent Khetu Lal, there are serious allegations of his own sons - appellants, who also died. In view of the above facts, the appeal is not against Dal Chand and Revat Mal because the appeal against the dead person is no appeal. Therefore, the appeal was only against respondent No. 3 Dalpat Rai who purchased the property of Khetu Lal in execution of money decree against Khetu Lal and was against Khetu Lal.

6. It is true that if one of the legal representatives, who can represent the estate of the deceased, is already on record, may be in different capacity, may be sufficient ground for non-dismissal of the appeal as abated. The Hon'ble Apex Court in the case of *Shahazabad Bi and Ors. v. Halimabi (since dead) by her LRs. reported* ¹ in held that in the facts of the said case, the trial Court was right in holding that the suit abated against the defendant No. 4 on his death but the entire suit did not abate on the death of the respondent No. 4. In another judgment delivered in the case of *N. Khosla v. Rajlakshmi (dead) and Ors. reported* ² in the donor's gift to three daughters R, N and

S giving 100 feet of land to each and the gift was revoked but the daughters afterward taking mutation in their name resulting into dispute between daughters and brothers of donee and arbitrator was appointed and the arbitrator treating the mutation as fraudulent, did not make award as Rule of Court. In that fact situation, when the appeal was preferred by brothers and one of the daughters 'R' died during pendency of the appeal, the Hon'ble Supreme Court held that the share of each daughter defined separately in metes and bounds, therefore, the appeal abated only against R and not as a whole.

7. With the support of the above authorities, learned counsel for the appellants submitted that even if the appeal abated, it abated against Dal Chand only and not against Dalpat Rai.

8. The first issue whether the present appeal itself abated because of non-imp leading of the legal representatives of Khetu Lal after his death during pendency of the appeal, the general principal of law cannot be applied that when one of the legal representatives of deceased is already on record, then the appeal cannot abate. The principle is that in case, where one of the parties in appeal (or in suit) dies and his any of the legal representatives is already on record, may be in different capacity, then the appeal (suit) may not abate. This principal has fundamental basis and that is the fact that the other legal representatives already on record in different capacity can represent the estate of the deceased person. When the total allegation is against the deceased person and that too levelled by his own legal representatives, while they are party in the suit in different capacity, then because of this fact alone, cannot represent the estate of the deceased person in appeal (suit) as their interests are in conflict with the interest of the dead person. In that situation, the legal representatives who have conflicting interest with the deceased's interest, are disentitled to represent the deceased.

9. In addition to the above, in the present case, the facts reveal that deceased Khetu Mal, father of the appellants, left behind daughters also and they have not been impleaded as party nor this fact has been brought to the notice of this Court that what is interest of those left out legal representatives of Khetu Lal. There may be possibility that they may represent Khetu Lal's estate and they may be competent person to represent Khetu Lal's estate. In view of the above reasons, the appellants cannot be permitted to represent the estate of their rival, may it be their father and, therefore, the appeal of the appellants cannot survive as a whole because of the reasons that without proving the fact alleged against the respondent Khetu Lal, may he be father of the

appellants, the appellants cannot succeed in proving their allegation levelled in the suit. This is further because of the reason that there are other legal representatives of Khetu Lal who may have no conflicting interest with Khetu Lal. No prayer has been made by the appellants/plaintiffs for appointment of representative of Khetu Lal's estate. Even if there is no legal representative of deceased party in the suit, the order may be obtained under Order 22 Rule 4A (1) Civil Procedure Code for appointment of Administrator General who may be an officer of the Court or other person and that officer or person can represent the estate of deceased person which may enable the Court to pass binding judgment and decree binding the estate of the deceased. The plaintiffs in this appeal have not prayed for appointment of Administrator General.

10. Apart from the above reason, if we look into the facts of the case, it is clear that there was no reason for not taking steps for bringing on record the legal representatives of deceased Dal Chand before the first appellate Court, who obtained the money decree and got the sale of the house in question. There was no reason for not impleading the legal representatives of Revat Mal also.

11. In view of the above reasons, the appeal of the appellants neither has merit nor can survive after the deaths of Dal Chand, Revat Mal and Khetu Lal. Consequently, this appeal is hereby dismissed.

Appeal dismissed.

Cases Referred.

1. 2004 (2) WLC (SC) Civil 485: (AIR 2004 SC 3942)
2. 2006 (1) WLC (SC) Civil 748: (AIR 2006 SC 1249)