

NAGPUR HIGH COURT

Shamrao Bhagwantrao

Vs

Kashibai

Misc. Civil Case No. 29 of 1952

(Hidayatullah and R. Kaushalendra Rao, JJ.)

12.03.1954

ORDER

R. Kaushalendra Rao, JJ.

1. This was a suit by Saraswatibai widow of one Parashram to obtain her share in the joint family property on the strength of the Hindu Women's Rights to Property Act. The suit succeeded and a 'Vyavasthapatra' executed by the husband and the widow among others was held not binding on Saraswatibai. As a result, a preliminary decree was passed in the trial Court and was confirmed by us.

2. During the pendency of the application for leave to appeal to the Supreme Court as also the proceedings for making the decree final, the widow died. Applications were made to bring the legal representatives of the widow on the record of the suit as well as of the Miscellaneous Civil Case involving the grant of leave. The legal representatives who claimed to join the suit were Vasantkumar, an alleged adopted son of Parashram (adopted by Saraswatibai after the death of her husband), kashibai daughter of Saraswatibai and Parashram, and Indubai step-daughter of Saraswatibai.

In the suit these were opposed. The learned Judge held that the cause of action did not survive to them and that the suit had ended as Shamrao the defendant was entitled to the whole property. Appeals against that order by all the contestants failed before us.

3. In the leave matter, however, by agreement all the three persons were substituted. As a result of our order in the appeals referred to last by us, the legal representatives have apparently lost all interest. This was said to us in so many words but the parties did not state this in writing when invited to do so.

4. The petitioner now says that Kashibai and Vasant Kumar are in possession of some property and are intermeddlers and must be treated as legal representatives. Unless they give up these properties and assure the petitioner that they are not intending appealing against our decision in the appeals arising from the suit, he must go on with this petition for leave. He says that the decision in the appeal sought to be appealed against would be used against him.

5. That these three persons are intermeddling with the property does not necessarily save the cause of action. The right under the Act is a special one. The daughters and the so called adopted son do not derive any right from the widow. That right came to an end with the death of the widow. As regards the adopted son, his position is unique. Assuming that he is validly adopted, it is quite plain that he has an independent right to partition. He cannot, however, continue the suit founded on a right personal to the widow under a special enactment. A cause of action is not extended by reason of the death of a party. A legal representative fights essentially the same suit which the original plaintiff began : See - '*Rat Charan v. Biswa Nath*¹', This suit the adopted son cannot now continue as the cause of action does not survive to him. He will have to bring his own suit to establish his right.

6. As regards the property in the hands of the daughter and the adopted son, the petitioner is not to gain anything by the appeal. He will in any event have to bring another suit. Indeed, there is no opposite party now and the plaintiff and defendant become one person. Such a suit cannot continue : See - '*Rustomji v. Purushottamdas*²',

(1) In our opinion, this petition has become infructuous by reason of merger of interest and also because the cause of action does not survive to any one but Shamrao the petitioner. The judgment of this Court affirmed the decree of the Court below and though the claim is above the mark, no substantial point of law, even if one be there, (and we do not decide this) survives between the parties as there are no parties. See in this connection - '*Subba Rao v. Krishna Prasad*³', - '*Gurudayal v. Sarju*⁴',

7. The petition shall be filed but with liberty to apply if Vasant Kumar, Kashibai and Indubai make an application for leave to appeal to the Supreme Court. In the circumstances of the case, parties shall bear their own costs.

Order accordingly.

Cases Referred.

¹ AIR 1915 Cal 103

² 25 Bom 606

³ AIR 1954 Mad 227

⁴ AIR 1952 Nag 43