

Thakur vs Mst. Maida Kaur And Ors. on 1 October, 1953

Equivalent citations: AIR1954ALL305, AIR 1954 ALLAHABAD 305

JUDGMENT

Malik, C.J.

1. A suit for possession was filed against several defendants. Puttu and Thakur, two brothers were also arrayed as defendants to the suit. The suit was decreed. Thakur alone appealed to this Court and impleaded as respondents, the plaintiff and the other defendants. In April 1949 the sole appellant, Thakur died. No application was filed to bring his legal representatives on the record within the period of limitation. On 11th December, 1950, an application was filed on behalf of Puttu in which the prayer was as follows :

"Wherefore it is prayed that the name of the applicant be struck off as respondent No. 4, he be transposed to the array of the appellants in place of Thakur deceased and be allowed to prosecute the appeal against the respondent according to law."

2. In the application it was mentioned that Puttu was the sole legal representative of the appellant Thakur who had died. Notice of this application was issued to the other respondents. The plaintiff respondent contested the application and a learned single Judge directed that the application along with the appeal be put up before a Bench for decision. No application has been filed under Section 5 of the Limitation Act as the contention of the learned counsel for Puttu is that the death of Thakur did not result in the abatement of the appeal since Puttu was already on the record arrayed as a respondent.

3. Learned counsel has relied on Order 1, Rule 10 C. P. C. and Order 22, Rr. 2 and 3 of the Code. Order 1, Rule 10 C. P. C. gives a discretion to the Courts to correct an error in the array of parties and under Sub-rule (1) of Rule 10 if there is a bona fide mistake, the mistake can be corrected by the Court. Under Sub-rule 2, the Court has the right to strike out the names of any party improperly joined and add any party the addition of whose name may be necessary for the proper decision of the case but this has to be done subject to the provisions of the Indian Limitation Act. Order 22, Rule 2 provides that :

"Where there are more plaintiffs or defendants than one, and any of them dies and where. the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the Court shall cause an entry to that effect to be made on the record and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants."

4. It would appear from the above that this rule applies only to a case where in the array of plaintiffs there are more than one plaintiff or in the array of defendants there are more than one defendant and after the death of one, the cause of action survives in the remaining plaintiffs and after the death of one defendant the cause of action survives against the remaining defendants. It does not apply to a case like the present where there is only one appellant and that appellant has died and no legal representative has been brought on the record within the period of ninety days provided under the Limitation Act or even within the further period of sixty days for setting aside the abatement. Rule 3 of Order 22 deals with a case where the right to sue does not survive to the surviving plaintiff or plaintiffs alone. An application to bring the legal representatives has to be made, in such a case within the period of limitation. Sub-rule (2) provides that where no application is made within the period of limitation, the suit would be deemed to have abated and such abatement is automatic.

5. The contention of learned counsel is that on the death of Thakur, the rights of Thakur survived to Puttu respondent and it was not necessary for Futtu to apply to have his name substituted in place of the name of Thakur or to have his name transposed from the array of respondents to the array of appellants within the period of limitation.

6. The point is covered by & division Bench ruling of this Court In --- 'Suba Govind Rai v. Mt. Anar Koer', AIR 1931 All 349 (A). There also one of several defendants had filed an appeal and he had died. One of the defendants-respondents was his legal representative and it was contended on his behalf that he was virtually in the same position as the appellant himself and had the right to continue the appeal. The learned Judges held that he had no such right and observed as follows:

"Order 41, Rule 4 merely enables one of several plaintiffs or defendants to appeal from a decree which proceeds on a ground common to them all. It does not provide that the plaintiffs or defendants who do not join with the appellant should be considered to be appellants for any purpose, it may be that the law entitled them to the benefit of the decree if it is obtained by a party whose Interests are identical with their own but this circumstance cannot convert a respondent in the array of parties into an appellant. It, therefore, they cannot be considered to be appellants on that account, Order 22, Rule 2, C. P. C. which applies only to a case of one of several appellants can have no application to the circumstances before us."

7. Learned counsel has urged that this case was wrongly decided. We do not see any reason to agree with his submission. Nor does it appear to be necessary that the view expressed by the Division Bench should be reconsidered. This view was followed by a learned single Judge of the Nagpur High Court, in -- 'Santoolal v. Cham-palal', AIR 1934 Nagpur 165 (B). Reliance has, however, been placed by learned counsel on three other cases but none of them is really helpful nor do they support the contention raised by learned counsel. 'Sheoram v. Atmaram', AIR 1943 Nag 13 (C), was a case where there were several appellants. One of the appellants died and the surviving appellants decided to continue the appeal but brought it to the notice of the Court that the legal representatives of the deceased appellant were already on the record in the array . of the respondents. In the circumstances there was no bar to the surviving appellants continuing the appeal. This case, therefore, has nothing to do with the case before us and is clearly distinguishable.

The second case relied on is -- 'Naranlal Jethalal v. Shivprasad Achratlal', AIR 1940 Bom 259 (D). There the sole plaintiff died and his legal representatives were his three sons and his widow. Within a period of ninety days of the death of the sole plaintiff, the widow also died but before the death, of the widow the three sons had applied to be brought on the record as the legal representatives of their father. It was urged that as the sons had applied to be brought on the record as legal representatives of the father, they did not. represent the mother's one-fourth interest and to that extent the suit had abated. The learned Judge observed as follows :

"I will assume, without deciding, that Bai Hira was one of the heirs of the plaintiff and that she ought therefore to have been brought on the record. But Bai Hira died on 15th April, 1938, which is less than 90 days from the date of the plaintiff's death, and her heirs were the three sons of the plaintiff, who were already on the record. It is argued however that as the three sons were not described on the record as suing not only as heirs of the plaintiff but also as heirs of their mother, the suit abated at any rate as to the mother's interest. That would seem to me to be a very unfortunate conclusion to arrive at, for I can see no justice in holding that a suit abates for want of parties when all parties interested were in fact before the Court,"

The only other case relied on is -- 'Hatimshah v. Ahmedshah', AIR 1949 sind 23 (E). In that case one of the defendants died. The plaintiff was the legal representative of the deceased defendant. The learned Judges held that the plaintiff could at any time inform the Court that one of the defendants had died but that the plaintiff was his legal representative.

8. In the case before us the sole appellant died in April 1949. No application was made by the legal representative of the deceased plaintiff (sic) that he be impleaded as appellant and allowed to continue the appeal. The sole appellant being dead, there was, in fact, no appeal pending in this Court and after the expiry of the period of limitation by the legal representatives of Thakur the appeal abated. The applicant Puttu cannot claim that he must be deemed to be an appellant and the appeal must be deemed to be still pending. There being, therefore, no pending appeal, he cannot claim to be transposed. The proper course open to him was to apply for substitution of names within the period of limitation and, if the period of limitation had already expired, to 'apply under Section 5 of the Limitation Act for condonation of the delay, if he could make out sufficient cause for condonation.

9. The application is dismissed and the appeal must, therefore, fail and is dismissed with costs.