

Onkar Singh And Anr. vs Rameshwar Minor And Ors. on 27 July, 1954

Equivalent citations: AIR1954ALL786, AIR 1954 ALLAHABAD 786

Author: Raghubar Dayal

Bench: Raghubar Dayal

JUDGMENT

1. The appellants made an application under Section 4, Encumbered Estates Act, which was forwarded to the Special Judge, 1st Grade, Budaun. In the written statement which was filed by them under Section 8, Encumbered Estates Act, they mentioned the villages Deorania and Jarauna among their property which was liable for the payment of their debts. Dori Lal and others filed a joint written statement under Section 11 of the Act wherein they claimed that they were the owners of these villages and were in possession of them and this property was therefore not liable to attachment and sale in satisfaction of the debts of the landlord applicants.

There is nothing in the written statement to indicate the extent of the shares of each of the persons who filed the joint written statement.

The learned Special Judge after a consideration of the evidence produced by the parties found that the objectors were the owners of these two villages and that they did not belong to the landlord-applicants. He therefore allowed the objection and deleted these two villages from the list of the property which was liable for the payment of the debts of the applicants. It is against this decision that the present appeal has been filed by the applicants.

2. Dori Lal, one of the respondents, died during the pendency of the appeal and his heirs were not brought on the record. The question for determination is whether the entire appeal fails or only to the extent of the share of Dori Lal.

3. It has been contended on behalf of the appellants that the share of Doli Lal in the property in dispute was only 3 annas 6 pies out of eight annas share as would appear from the sale deed dated 6-4-1937, which was on the record and in view of this evidence the appeal did not abate as a whole but only to the extent of Dori Lal's share. It has also been contended that merely because the share of Dori Lal in the property in dispute was not mentioned in the objection filed fay Kirn and others jointly or in the judgment of the Court that would not prevent the Court from determining his share in order to decide as to what extent the appeal had abated.

4. In -- Tej Narain Sahu v. Dal Ram Sahu,' AIR 1922 Pat 606 (A) it was held that where the plaintiffs had obtained a joint decree for possession and the defendants appealed against that decree but during the pendency of the appeal one of the plaintiffs died and his legal representatives were not

brought on the record the entire appeal failed and not only to the extent of the interest of the deceased plaintiff.

The reason for the decision was that in case the appeal was allowed against the plaintiffs who were already on the record it would result in two inconsistent decrees and the decree which would be obtained by the defendants, in case their appeal was allowed, could not be executed against the heirs of the deceased plaintiff who were not brought on the record and they would be entitled to execute the joint decree which had become final so far as they were concerned against the defendants. The test in such cases is whether the interest of the defendants in the suit was joint and indivisible and whether if the appeal were allowed there would be two inconsistent decrees in the same case with respect to the same subject-matter.

5. In -- 'Gajraj Tewari v. Bhagirathi Pande', AIR 1924 All 95 (B) Daniels, J. held that where a joint decree had been given in favour of the respondents, the entire appeal would fail if the appellant failed to bring the legal representatives of the deceased respondent on the record. In this case two of the plaintiffs, who had obtained a joint decree for a declaration that they were the owners and in possession of certain plots, died and their legal representatives were not brought on the record in the appeal which had been filed by the defendants against whom the joint decree had been obtained.

His Lordship among other cases made reference to the case of -- 'Kali Dayal Bhattacharya v. Nagendranath', AIR 1920 Cal 264 (C) in which the whole case law on the subject was reviewed and the reason for the decision was given. His Lordship made the following observations in that case:

"The ground of decision was that although Order 22, Rule 4 only provides for the appeal abating as against the deceased respondent the result of its abating against him may be in certain cases that the appeal has thereafter become imperfectly constituted, so that the appellant can no longer invite the Court to adjudicate upon the matters in controversy. The representatives of the deceased decree-holders, against whom the appeal has abated, have obtained an unassailable decree declaring that they jointly with the other decree-holders are proprietors in possession of the suit land. If the appeal were allowed as against the other decree-holders the result would be two contrary declarations; one declaring that the proprietors of the respondent's village are entitled to and in possession of the land in question and the other declaring that they are not so entitled and in possession. It has been held in these cases that this is a state of things which the law does not contemplate and which cannot be allowed and that it would result in very serious inconveniences."

6. In support of the contention that the entire appeal does not fail but it abates only to the extent of the share of the deceased respondent and that this share even if it is not clear from the judgment can be determined by the Court hearing the appeal, the first case relied on is of-- 'Narain Das v. Sheo Din', AIR 1926 All 234 D..

In this case Sheo Din and Debi brought a suit for redemption against certain persons. This suit was decreed by the trial Court. The defendants filed an appeal and there was a cross-objection by the

plaintiffs. Both the appeal and the cross-objections were dismissed. The defendants preferred a second appeal to the High Court. During the pendency of the appeal one of the respondents Sheo Din died and no application was made to bring his legal representatives on the record.

The question which arose in this appeal was whether on account of the failure of the appellants to implead the heirs of the deceased respondent Sheo Din within the period of limitation the entire appeal had abated or only to the extent of the interest of Sheo Din. It was held that the entire appeal did not fail and the reason was that even if the appeal were allowed the result would be that Debi would be disentitled from executing his decree and his right thereunder would be extinguished though that would not necessarily affect Sheo Din and his heirs who might be allowed to execute the whole decree or at any rate a part of the decree. There will be no conflicting or inconsistent decrees.

In the case before us the appeal would become infructuous if it is allowed against the respondents who are on the record. The result of the decision would be that a portion of the property would become liable to attachment and sale but in view of the fact that the decree obtained by the deceased respondent Dori Lal has become final the entire property cannot be attached or sold in satisfaction of the debts of the landlord applicants. There can be no doubt that there would be two inconsistent decrees, one holding that part of the property is liable to attachment and sale in satisfaction of the debts of the applicants whereas another holding that the entire property is not liable to such attachment and sale. In view of these two inconsistent decrees the property could not be attached and sold in satisfaction of the debts of the applicants.

7. Another case relied on by the appellants is-- 'Paqira v. Hardewa', AIR 1928 All 172 (E). In this case the plaintiffs instituted a suit for a declaration of title. Their case was that in the khewat their proper share was 60 out of an entire quantity of 145 shares, the share of defendants 1 to 3 was 79 out of the same quantity, and that of the defendants 4 to 8 seven out of the same quantity. According to the khewat the entire share was divided into 89 portions and the plaintiffs were recorded in respect of 3, defendants 1 to 3 in respect of 79 and the remaining defendant 4 to 8 in respect of 7 shares. After the institution of the second appeal defendant 4 died and his heirs were not brought on the record. It was held that the appeal did not abate against the defendants 1 to 3 but abated only against the defendants 4 to 8.

In our opinion this decision is not of much help to the appellants because the share of the defendants 4 to 8 in the property in dispute had been clearly denned and it was distinct from the shares of the defendants 1 to 3 who formed another set. As the share of the defendants 4 to 8 had been separately defined the appeal abated against them only. This decision also shows that the appeal did not abate only to the extent of the interest of defendnat 4 who had died but against the defendants 4 to 8 who formed one set and who jointly were cosharers of seven shares.

8. The next case is of -- 'Haibat Shah v. Bohra Tarachand', AIR 1931 All 235 (P). This was a suit brought by a mortgagee for the recovery of the mortgage money against four mortgagors. During the pendency of the suit one of the mortgagors died and his legal representatives were not brought on the record Within the period of limitation. The question which arose in the case was whether the entire suit had abated or only to the extent of the interest of the deceased mortgagor.

The trial Court found that from the terms of the mortgage deed itself it appeared that Saadat Shah had no interest in the mortgaged property and therefore it was unnecessary to implead his widow Jamila Begam. It accordingly decreed the claim with costs. It was contended in appeal that the entire suit had abated on account of the failure of the plaintiff to implead the heirs of Saadat Shah. The contention was not accepted and the appeal was dismissed.

On second appeal to the High Court it was held that the entire suit did not fail but it abated only to the extent of the interest of Saadat Shah in the hypothecated property and that the plaintiff was entitled to a decree for a proportionate amount of the mortgage money and for a sale of the proportionate share of the mortgaged property. It remanded the case for the determination of the share of Saadat Shah in the mortgaged property.

9. The question which had arisen in this connection is whether this share could be determined by the Court in the absence of the legal representatives of Saadat Shah and if it was determined in their absence how far the decision would be binding on them. It is not clear from the judgment whether for the purpose of determining the share of Saadat Shah in the mortgaged property his legal representatives were to be brought on the record after the period of limitation.

It appears somewhat inconsistent that though they could not be brought on the record after the period of limitation for the purpose of deciding the appeal yet they could be so brought for the purpose of determining the share of Saadat Shah. In any case, the determination of the share of Saadat Shah in the absence of his legal representatives will be of no effect on them and will not bind them. Moreover, this is not a case where there is a possibility of two contradictory or inconsistent decrees. The original decree provides for the sale of the entire mortgaged property while the decree passed by the High Court exempts the share of Saadat Shah from the sale and it is capable of execution.

10. The next case is of -- 'Raghunath Das v. Shah Durga Prasad', AIR 1930 All 369 (G). In this case the plaintiff brought a suit for a declaration that he was the owner of a certain property and the names of the defendants against that property were fictitiously entered in the revenue papers. During the pendency of the suit one of the defendants died and his legal representatives were not brought on the record within the period of limitation. One of the questions which arose in the case was whether the entire suit had abated or whether it had abated only against the heirs of defendant 4 who had died.

The case of -- 'AIR 1928 All 172 (E)' cited above was referred to in this case. It was held by their Lordships that the whole basis of the decision in -- 'AIR 1928 All 172 (E)' was that the consequence of holding that the whole suit did not abate or the whole appeal did not abate would be that there would be two contradictory decrees. Their Lordships did not dispute the above proposition and rather affirmed that in case there was a possibility of two inconsistent decrees in the same case in case the appeal was allowed against the respondents other than the deceased one the entire appeal should be dismissed.

On the contrary, they found that in case the appeal was allowed there was no possibility of two contradictory decrees and the learned counsel for the respondents had not been able to show how there could be two contradictory decrees in case the appeal were allowed; the plaintiffs would get a decree for a declaration against the respondents who were on the record though that would not in any way affect the rights of the heirs of the deceased defendant 4 against whom the suit had been dismissed.

11. After a consideration of the above authorities we are of the opinion that in a case of joint decree where there is no specification of shares of the several decree-holders and where the decree is one and indivisible the entire appeal should fail if one or more of the decree-holders dies during the pendency of the appeal and his heirs are not brought on the record within the period of limitation. If, however, there is any admission of the deceased decree-holder, on the record indicating the extent of his share in the disputed property or there is anything in the judgment describing his share in the property then in that case the appeal would abate only to the extent of his interest so admitted or described. We do not think that it is open to the appellate Court to determine the extent of the share of the deceased respondent in the absence of his legal representatives. We are also of the opinion that where the legal representatives have not been brought on the record during the period of limitation for the hearing of the appeal they could not be so brought later on for the determination of the share of the deceased respondent in the disputed property.

Another test which has to be applied in order to determine whether the appeal fails as a whole or only to the extent of the interest of the deceased respondent is whether in case the appeal is allowed against the respondents who are already on the record there would be two inconsistent decrees in the same case with respect to the same subject matter or not. In case there will be two inconsistent decrees which will be infructuous the appeal should fail as a whole because it would be fruitless to pass a decree which will be ineffective and incapable of execution in view of the decree in favour of the deceased respondent which has become final. Where, however, there is no likelihood of two inconsistent decrees in case the appeal is allowed against the respondents who are on the record and the decree passed in appeal can be executed then in that case the appeal does not fail as a whole.

12. In the present case the objection has been allowed in respect of the entire property and it cannot, therefore, be sold for the satisfaction of the debts. As already pointed out above, in case the appeal is allowed against the respondents who are on the record there will be two inconsistent decrees, one saying that some of the property can be sold in satisfaction of the debts whereas the other saying that the entire property cannot be sold in satisfaction of the decree.

The sale deed of 6-4-1937, which according to the appellant is said to be the basis of the title of the respondents is not in respect of the entire villages Deorania and Jarauna. By means of this sale deed only eight annas share was sold and in this eight, annas share the share of Dori Lal was 3 annas 6 pies. This sale deed does not explain how Dori Lal and others obtained the remaining share in the two villages. If this sale deed is accepted then the share of Dori Lal in the two villages comes to 3 annas 6 pies in 10 biswas share. According to the contention on behalf of the appellants the appeal abates only to the extent of this share in the two villages though according to the decree of the Special Judge the objection of Dori Lal has been allowed in respect of the entire two villages. There

can be no doubt that there would be two conflicting and inconsistent decrees in the case if the appeal is allowed against the respondents on the record.

In the circumstances we are of opinion that the appeal fails as a whole and not only to the extent of the share of the deceased respondent.

13. We, therefore, dismiss this appeal.