Madan Naik (Dead) By Legal ... vs Hansubala Devi And Ors. on 8 April, 1983

Equivalent citations: AIR1983SC676, 1983(1)SCALE382, (1983)3SCC15, AIR 1983 SUPREME COURT 676, 1983 UJ (SC) 428, (1983) 2 APLJ 17.2, 1983 (15) LAWYER 69, (1983) 2 CIVLJ 45, 1983 (3) SCC 15, (1983) 2 SCWR 235

Bench: D.A. Desai, O. Chinnappa Reddy

JUDGMENT

Desai, J.

1. One Jogendra Naik and two others filed a suit bearing No. 81/11 of 1952/54 against one Madan Naik and 5 others for a declaration of title and confirmation of exclusive possession in respect of a tank and its embankment in village Dahiari in the Court of Additional Munsif, Giridih. The suit ended in a decree in favour of the plaintiffs on June 25, 1954. The defendants in the suit Madan Naik and others preferred First Appeal in the Court of Subordinate Judge, Hazaribagh. The appeal came up for hearing before Fir'st Additional Subordinate Judge, Hazaribagh, who by his judgment and order dated September, 24, 1955 dismissed the appeal and confirmed the decree passed by the Trial Court. The original defendants carried the matter in Second Appeal No. 1872 of 1955 to the High Court of Judicature at Patna. During the pendency of the appeal, it transpired that Jogendra Naik respondent No. 1 in the appeal had died on July 10, 1955 when the matter was pending in the First Appellate Court. An application was made on May 14, 1956 for setting aside the abatement and bringing the heirs and legal representatives of deceased Jogendra Naik on record. The High Court by its judgment and order dated July 26, 1957 set aside the decree passed by the First Appellate Court and remitted the appeal to the First Appellate Court with a direction that the application for setting aside the abatement and substitution and the counter-affidavit opposing the same be considered by the First Appellate Court and dispose of the same in accordance with law. When after the remand, the appeal came up for hearing before the First Additional Sub-Judge, Hazaribagh. The learned Judge took up the application for setting the abatement and for substitution. The learned Judge was of the opinion that no case was made out for condoning the delay in making the application for substitution and accordingly declined to condone the delay. Consequently, the learned Judge rejected the application for substitution as time-barred. The learned Judge further held that in view of the failure of the appellants to bring heirs and legal representatives of deceased Jogendra Naik on record in time, the first appeal abated as a whole. While making this order, the learned Judge articulated the final order as under which gave precedence to procedural clap-trap without any adjudication of the dispute on merits. The order made by the learned Judge read as under:

> 11. I, therefore, hold that the entire appeal has abated'. It is therefore, not necessary to hear the appeal again on merits. 12. It is, therefore, ordered that the appeal be dismissed on contest. I do not award any cost to any party considering the circumstances of the case.

Pursuant to this final order, a decree was drawn up incorporating therein the aforementioned final order. Original defendants filed Second Appeal No. 566 of 1968 on May 5, 1958 in the High Court. When the Second Appeal came up for admission, it probably dawned upon the appellants that as the first appeal was disposed of as having abated and an order refusing to set aside the abatement is made under Order 22 Rule 9, CPC, an appeal from that order would lie under Order 43 Rule 1(K) to the High Court and accordingly an appeal from the Order was filed numbered as M.A.E. No. 55 of 1959. As this appeal from order was filed beyond the period of imitation, an application under Section 5 of the Limitation Act was made praying for condonation of delay in filing the appeal. Another application was made to hear the appeal from order alongwith the Second Appeal. Pursuant to this order both, the appeal from order and the second appeal came up together for admission. The learned Single Judge admitted the appeal from order and dismissed the Second Appeal making the confusion worse confounded.

2. The Learned Single Judge who heard the appeal from order was of the opinion that the appellants in the appellate Court had successfully made out sufficient cause for condoning the delay in seeking substitution of the heirs and legal representatives of the deceased 1st Respondent-Jogendra Naik and accordingly condoned the delay, set aside the abatement and granted substitution. A contention was raised on behalf of the respondents in the High Court before the learned Judge that as the second appeal was dismissed, the decree having-become final and having merged in the decree of the High Court, it was not open to the learned Judge to allow the appeal from order and the appeal from order is liable to be dismissed as having become infructuous. Negativing this contention, the learned Judge held that as the second appeal was incompetent, "it may be deemed to have never been filed, since no second appeal lay, and, therefore, the order-dismissing the appeal would be treated as ineffective". The original plaintiffs preferred Letters Patent Appeal No. 48 of 1961 against the decision of the learned Single Judge. A Division Bench of the Patna High Court held that the dismissal of the second appeal would render the appeal from order infructuous. The Division Bench was further of the opinion that if the appeal from order is allowed and the matter is remitted for re-hearing on merits conflicting decrees would come into existence which is impermissible. Accordingly, the Letters Patent Appeal was allowed and the decision of the learned Single Judge in appeal from order was set aside. The High Court at the instance of the original defendants granted a certificate under Article 133(1)(c) of the Constitution as in the opinion of the High Court the matter is of sufficient importance to deserve consideration by the Supreme Court.

3. Frequently, it appears that procedural provisions devised to facilitate justice are so interpreted which would inhibit adjudication of dispute on merits which in this case started way back in 1954 and the view we are disposed to take would necessitate consideration of the same by the first appellate court after nearly three decades. Such an approach stigmatised the justice delivery system being condemned as prolix, unending dilatory and time-consuming.

4. Plaintiffs succeeded in the trial Court. Defendants preferred first appeal in the Court of Sub-Judge, Hazaribagh. In fact, when the appeal was pending the first appellate court, the first respondent died on July 10, 1955. No one brought this fact to the notice of the Court and the learned Judge disposed of the appeal on September 24, 1955. The appeal by the defendants was dismissed and the decree of the trial court was confirmed. When the matter was before the High Court at the instance of the defendants, in the second appeal, the defendants-appellants before the High Court became wise to the fact that the 1st respondent in the first appellate court had died. At that state, an application for substitution accompanied by an application for condoning the delay in making the application and praying for setting aside the abatement of the appeal was moved, by the defendants-appellants. A learned Single Judge of the High Court accordingly allowed the second appeal on the narrow ground that the application merits consideration by the first appellate court and remitted the matter to the first appellate court with a direction to decide the application for substitution in accordance with law. The first appellate court did not accept the submission of the defendants-appellants that they were prevented by sufficient cause from moving the application for substitution in time and accordingly declined to condone the delay and rejected the application for substitution as time-barred and disposed of the appeal as having abated as a whole. So far there is no difficulty. But the Court drew up a decree showing appeal having been dismissed on merits.

5. Order 22, Rule 11 of the CPC read with Order 22 Rule 4 makes it obligatory to seek substitution of the heirs and legal representatives of deceased respondent if the right to sue survives. Such substitution has to be sought within the time prescribed by law of limitation. If no such substitution is sought, the appeal will abate. Sub-rule (2) Rule 9 of Order 22 enables the party who is under an obligation to seek substitution to apply for an order to set aside the abatement and if it is proved that he was prevented by any sufficient cause from continuing the suit which would include an appeal, the Court shall set aside the abatement. Now where an application for setting aside an abatement is made, but the Court having not been satisfied that the party seeking setting aside of abatement was prevented by sufficient cause from continuing the appeal, the Court may decline to set aside the abatement. Then the net result would be that the appeal would stand disposed of as having abated. It may be mentioned that no specific order for abatement of a proceeding under one or the other provision of Order 22 is envisaged, the abatement takes place on its own force by passage of time. In fact, a specific order is necessary under Order 22 Rule 9, C. P. C. for setting aside the abatement.

6. When an appeal is disposed of having abated and thereafter an application is made for setting aside abatement of appeal, an order refusing to set aside abatement is appealable as an order under Order 40 Rule 1(k) C.P.C. There being a specific provision conferring a right of appeal, one can resort to the same.

7. The first error occurred when after disposing of the appeal as having abated, the learned Judge of the first appellate Court proceeded to direct that the appeal is dismissed on contest. There was no contest. There was no adjudication of rights or adjudication of dispute on merits. The claim in the suit was with regard to title to a tank and its embankment. There was no formal complete and binding adjudication of the rights of the parties as canvassed in the appeal before the first appellate court. The appeal stood disposed of as having abated without the slightest reference to the rights of

the parties. In this situation, there was no question of the drawing up the decree.

8. Section 2 Sub-section (2) of the CPC defines 'decree' to mean "the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to allow any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 144 but shall not include any adjudication from which an appeal lies as an appeal from an order." When an appeal abates for want of substitution as envisaged by Sub-rule 1 of Rule 9 of Order 22, it precludes a fresh suit being brought on the same cause of action. It is a specific provision. If abatement implied adjudication on merits, Section 11 of C.P.C. would be attracted. Abatement of an appeal does not imply adjudication on merits and hence a specific provision had to be made in Order 22 Rule 9(1) that no fresh suit could be brought on the same cause of action. Therefore when the appeal abated there was no decree, disposing of the first appeal, only course open is to move the court for setting aside abatement. An order under Order 22 Rule 9(2) C.P.C. refusing to set aside abatement is specifically appealable under Order 43 Rule 1(k). Such an adjudication if it can be so styled would not be a decree as defined in Section 2(2) C.P.C. Section 100 provides for second appeal to the High Court from every decree passed in appeal by any Court subordinate to the High Court on the grounds therein set out. What is worthy of notice is that a second appeal lies against a decree passed in appeal. An order under Order 22 Rule 9 appealable as an order would not be a decree and therefore, no second appeal would lie against that order. Such an appeal is liable to be rejected as incompetent.

9. It would thus appear that the second appeal preferred by the original defendants was incompetent. But the appeal from order refusing to set aside abatement was competent. If the second appeal was incompetent, its dismissal cannot have any impact on the disposal on merits of the appeal from order, and that was rightly done by the learned Single Judge. The learned Single Judge admitted the appeal from order and dismissed the second appeal. In fact, in order to avoid this prolonged litigation upto this Court, it could have been mentioned that the second appeal is dismissed as incompetent or as having become infractions as the appeal from order was preferred. In any event, the legal position would not change merely because an incompetent second appeal was preferred which came up for hearing and was dismissed in the circumstances clearly showing that it was dismissed as incompetent. It could have no impact on merits or validity of the decision of the learned single Judge in the appeal from order.

10. It may be recalled that the appeal from order was allowed holding that the appellants in the first appellate court were prevented by sufficient cause from seeking substitution within the prescribed period of limitation and an acceptable case was made out for condoning the delay, setting aside the abatement and granting substitution. This decision of the learned Single Judge in appeal from order remains unimpaired, unaffected and inviolable by the dismissal of the second appeal on the ground that it was either incompetent or infructuous.

11. After the learned Single Judge allowed the appeal from order and remitted the case to the first appellate court, original plaintiffs preferred Letters Patent Appeal. Frankly speaking, no appeal would lie under Letters Patent against a decision rendered by the High Court in an appeal from

order under Order 43 Rule 1. This is one good ground to quash the decision of the High Court in Letters Patent Appeal. But assuming without deciding that Letters Patent appeal was competent, even on merits, the High Court was not justified in interfering with the decision of the learned Single Judge. The Division Bench hearing the Letters Patent Appeal was clearly in error in holding that the dismissal of the second appeal had rendered the appeal from order infructuous. We are unable to appreciate how this conclusion is arrived at by the High Court and it is wholly unsustainable.

12. The High Court was equally in error in holding that the second appeal was not incompetent because the first appellate court had also made an order dismissing the appeal on contest. That part of the order of the first appellate court was contrary to law and without jurisdiction and non-est, once the learned Judge held the appeal before him had abated. For these reasons we are satisfied that the Division Bench of the Court was in error in allowing the Letters Patent Appeal and its decision is contrary to law and unsustainable and must be quashed and set aside.

13. Accordingly, this appeal succeeds and is allowed and the decision of the High Court in Letters Patent Appeal No. 48 of 1961 dated May 14, 1965 is quashed and set aside and the decision of the learned Single Judge dated March 23, 1961 in M.A.E. No. 55 of 1959 is restored. As the respondents have not appeared, there shall be no order as to costs.